(7)

No. 90-6616

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JAMES R. STRINGER,

Petitioner,

v.

LEE ROY BLACK, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF PETITIONER

KENNETH J. ROSE *
923 Carolina Ave.
Durham, N.C. 27705
(919) 286-7653

JAMES W. CRAIG
123 E. Griffith St.
Jackson, Miss. 39201
(601) 352-0784

LOUIS D. BILIONIS
School of Law
University of North Carolina
Chapel Hill, N.C. 27599-3380
(919) 962-7219

* Counsel of Record

Counsel for Petitioner

56pp

QUESTIONS PRESENTED

1. Whether the "rule" applied in *Maynard v. Cartwright* is new?

2. Whether the "rule" applied in *Clemons v. Mississippi* requiring a state appellate court to review the facts and circumstances of the individual case to cure constitutional error in a capital sentencing proceeding is new?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-6616

JAMES R. STRINGER,

Petitioner,

v.

LEE ROY BLACK, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit rendered on July 30, 1990, is reported at *Stringer v. Black*, 909 F.2d 111 (5th Cir. 1990), and is reprinted in the Joint Appendix at J.A. 68.

The majority and dissenting opinion of the United States Court of Appeals for the Fifth Circuit rendered in 1988 is officially reported at *Stringer v. Jackson*, 862 F.2d 1108 (5th Cir. 1988), and is reprinted in the Joint Appendix at J.A. 26.

JURISDICTION

Jurisdiction of this Court rests upon 28 U.S.C. Section 1254(1). The judgment and opinion of the Fifth Circuit was rendered on July 30, 1990. Petitioner filed

a timely petition for certiorari which this Court granted on May 13, 1991.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions:

a. The Eighth Amendment to the United States Constitution, which provides in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

b. The Fourteenth Amendment to the United States Constitution, which provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Record and Proceedings in the Trial Court

On June 21, 1982, Ray McWilliams and his wife, Nell McWilliams, were discovered in their Jackson, Mississippi, home, dead of gunshot wounds. Police eventually arrested Mike Meddars and Rhonda Brock, after Meddars had been picked up in another part of the state for assaulting Brock. Meddars admitted his and Brock's involvement in the murders in Jackson, and after negotiating a deal with the police which protected him and Brock from the gas chamber, blamed James Stringer, James's son Jimbo Stringer, and John Mack Parker for actually committing the murders in the course of a robbery attempt.

The State's theory that James Stringer led the others in a robbery of Ray McWilliams was presented at trial almost exclusively through the testimony of coindictees Brock and Meddars. According to Meddars, the group met to work out a plan for the robbery. (T-717). During the planning, the group was drinking heavily and smoking marijuana; James Stringer was the most intoxicated of the group, according to Meddars. (T-729). Meddars drove the group past the house before the robbery to assist the planning. The plan was for Stringer and Brock to go to the McWilliams' home at night and get invited inside on the pretext that Brock needed cash in a hurry and was willing to sell jewelry. Once they were inside, Ray McWilliams would be forced to tell the robbers where he kept his cash. After the robbery, the plan was to cut the victims' throats so as to avoid gunshots, because they "all knew" a policeman lived nearby. (T-719). Meddars drove the car used in the crime and provided the bandanna which was to be used to wipe fingerprints. (T-720).

Events did not unfold according to this plan. According to Brock, Ray McWilliams got into a struggle with James Stringer. Mack Parker than put a pistol to McWilliams head and said "you are a dead man," pulling the trigger and killing McWilliams with a single gun shot. Nell McWilliams came into the kitchen, and Stringer's son shot her in the back of the head with a shotgun, killing her instantly. (T-513). The pathologist, Dr. Rodrigo Galvez, testified as a witness for the State that Nell McWilliams suffered no "defense wounds." (T-513-514). According to witnesses, between the sound of the first shot and the sound of the last, only eight to ten seconds elapsed. (T-468). The five hastily left the home without taking anything and drove off in Meddar's car. James Stringer was unaware Mrs. McWilliams had been killed until the group was back in the car and driving off.

In the summer of 1982, when the crime occurred, James Stringer was fifty years old (T-1133). He had been married to the same wife for twenty-six years and had four children (T-1131). James had a ninth grade education in Mississippi schools (T-1131-32). At a young age, James volunteered for service in the United States Army during the Korean War. He served in a front-line regiment and

was decorated for heroism during the war (T-1132). He reenlisted in the Army and served for a total of seven years before receiving an honorable discharge (T-1132). James thereafter established himself as a businessman in Jackson, Mississippi, where he lived from 1961 until his arrest in 1982 (T-1132; 1138-39). For more than fifteen years, he owned and operated a used car business. (T-1133). He converted his car lot to a gold and silver exchange. In this business located in downtown Jackson, James had himself been the victim of armed robberies on many occasions (T-1138-39).

In 1979, James became emotionally devastated when his niece was murdered (T-1135). He attempted to investigate the murder by himself as a means of coping with this trauma and during this effort found himself in several fights which resulted in misdemeanor convictions (T-1135). Prior to his capital murder conviction in this case, James had no felony convictions and no significant history of prior criminal activity. (T-1137).

Before the events giving rise to this prosecution, James Stringer's physical and financial conditions also took sharp turns for the worse. His hands were crushed in an accident and he was unable to operate his business (T-1141-1164). The medical bills for the necessary surgery totalled at least ten to fifteen thousand dollars (T-1141-42). At the end of May 1982, more misfortune befell James Stringer when he suffered an automobile accident in which he reinjured his back. (T-1142, 1158-59). James suffered chronic and debilitating pain from these injuries. (T-1141, 1159, 1161).

James was tried and convicted solely for the capital murder of Nell McWilliams. The trial court instructed the jury that if it found Stringer knowingly committed "any act which is an ingredient of the crime of capital murder or immediately connected with it, or leading to its commission, then and in that event, [the jury] should find the Defendant guilty of capital murder." (T-1412).

The instructions permitted the jury to find James Stringer guilty of capital murder as an accessory, without findings of premeditation and deliberation, malice aforethought, or intent to kill (T-1402, 1412).

Mississippi's sentencing scheme requires jurors to find that statutorily defined aggravating circumstances are not outweighed by mitigating circumstances before imposing a sentence of death. The jury is required to specify its findings of aggravating circumstances, but not its findings of mitigating circumstances. Only evidence related to statutory aggravating circumstances found unanimously by the jury can be considered in the weighing process.[1] *See Coleman v. State*, 378 So.2d 640, 648 (Miss. 1979).

---

[1] Consistent with Mississippi law, James Stringer's jury was instructed in the following manner:

> To return the death penalty, you must unanimously find from the evidence, beyond a reasonable doubt, that any aggravating circumstance(s)—those which tend to warrant the death penalty—outweigh the mitigating circumstance(s)—those which tend to warrant the less severe penalty of life imprisonment.
>
> Consider only the following elements of aggravation in determining whether the death penalty should be imposed. Before you can return the death penalty in this case, you, the jury, must unanimously find from the evidence in this case, beyond a reasonable doubt, that one or more of the following aggravating circumstance(s) exist in this case . . . .
>
> If you so find, then you must proceed to weigh any such aggravating circumstance(s) against any existing mitigating circumstance(s) to determine whether the aggravating circumstance(s), if any, outweigh the mitigating circumstance(s), if any . . . .
>
> If you unanimously find from the evidence any one or more of the mitigating circumstance(s) listed above exists, and, if after weighing the mitigating circumstance(s) and the aggravating circumstance(s), one against the other, you further find unanimously from the evidence beyond a reasonable doubt that the aggravating circumstance(s) outweigh the mitigating circumstance(s) and the death penalty should be imposed, your verdict shall be written on a separate sheet of paper, shall be signed by your foreman, and shall be in the following form . . . .
>
> J.A. 10-12.

The trial judge instructed the jury to consider three "aggravating circumstances". The first aggravating circumstance submitted to the jury was that "the Defendant contemplated that life would be taken and/or the capital murder was intentionally committed and the Defendant shared in that intent, while the defendant was engaged in an attempt to commit a robbery; and was committed for pecuniary gain." The second aggravating circumstance submitted to the jury that "the capital murder was committed for the purpose of avoiding or preventing the detection and lawful arrest of James R. Stringer, the Defendant." (T-1431-1432).

Finally, the jury was permitted to consider the aggravating circumstance, that "the capital murder was especially heinous, atrocious or cruel". (T-1432). The trial court gave the jury no guidance as to what that phrase meant.

This broadly phrased and utterly undefined aggravating circumstance figured prominently in the prosecutor's final argument to the jury. Indeed, the prosecutor vigorously argued that the jury should view the especially heinous, atrocious and cruel nature of the crime as the primary justification for imposing the death sentence. (T-1370-71, 1373-74, 1377-78). Driving his point home, the prosecutor projected photographic slides of both corpses to the jury and asked the jurors, "Is that atrocious? Is that cruel?"

The jury returned a verdict of death after finding each of the three aggravating circumstances that were submitted.[2]

---

[2] Of the original group accused by Meddars and Brock, James Stringer is the only one on death row. Mike Meddars, who drove the car, carried a .38 pistol, provided the bandanna and suggested the knife as a means of murdering Mr. and Mrs. McWilliams, was permitted to plead guilty to manslaughter and received a twenty-year sentence in exchange for his testimony. Rhonda Brock, who carried a .25 automatic pistol (T-730), who went with James Stringer to the door of the McWilliams' house and tried to trick her way into the house to commit the robbery and murder, also received a twenty-year sentence under her plea agreement. John Mack Parker, who shot and killed Ray McWilliams, pled guilty and received a life sentence. Jimbo Stringer, who shot and killed Nell McWilliams with a shotgun, was tried, convicted, and sentenced to life in prison by a jury. He also was tried for his part in the murder of Ray McWilliams; that case was resolved with a negotiated life sentence.

B. Procedings on Direct Appeal

On direct appeal the Mississippi Supreme Court affirmed James's conviction and death sentence. It summarily reviewed the jury's findings of aggravating circumstances, stating only that the "evidence fully supports the jury's finding of statutorily required aggravating circumstances." *Stringer v. State*, 454 So.2d 468, 479 (Miss. 1984). "[A]s required by statute," it considered "whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor" and concluded that it was not because "a study of the record could not reveal evidence stronger for [the] death penalty." *Id.* at 478. This conclusion appears to rest primarily on the consideration that the killings of Mr. and Mrs. McWilliams consitituted "acts of violence hard to be imagined by the average citizen." *Id.* at 471. The portion of the opinion summarizing the conclusion recites various features of the crime without analyzing the particular significance of any of them, emphasizing only that James Stringer's level of involvement in the planning and conduct of the armed robbery warrants "the affirmance of appellant's death penalty . . ., even though he did not actually pull the trigger of the weapon that caused the death." *Id.* at 479. None of the mitigating evidence shown by the record, other than the fact that James Stringer did not personally kill either victim, is considered in the Mississippi Supreme Court opinion.

On February 19, 1985, this Court denied *certiorari*. *Stringer v. Mississippi*, 469 U.S. 1230.

C. Post-Appeal Proceedings

James Stringer was denied post-conviction relief by the Mississippi Supreme Court. *Stringer v. State*, 485 So.2d 274 (Miss. 1986). A Petition for Writ of Habeas Corpus was filed with the United States District Court for the Southern District of Mississippi raising a *Godfrey* challenge to the application of the Mississippi especially heinous, atrocious or cruel aggravating circumstance as a basis for his death sentence. The United States District Court denied relief on this claim and all other federal post-conviction claims. *Stringer v. Scroggy*, 675 F.Supp. 356 (S.D. Miss. 1987). The United States Court of Appeals for the Fifth Circuit affirmed the District Court's decision. *Stringer v. Jackson*, 862 F.2d 1108 (5th Cir. 1988), *reh. denied*, 866 F.2d 1417 (1989). The Fifth Circuit relied on its interpretation of a particular Mississippi procedure providing that a death sentence "should be upheld even though an aggragating circumstance is found invalid or unsupported by the evidence, so long as at least one aggravating circumstance remains." *Id.* at 1113. This "*automatic* affirmance" procedure, *see Clemons v. Mississippi*. 494 U.S. ——, ——, 110 S.Ct. 1441, 1450 (1990) (characterizing Mississippi procedure as "[a]n automatic rule of affirmance"), was not invoked by the Mississippi courts in James Stringer's case.

This Court vacated the decision below, and remanded the case for further consideration in light of *Clemons*. *Stringer v. Black*, —— U.S. ——, 110 S.Ct. 1800 (1990). On remand, the Fifth Circuit reinstated its previous judgment in a summary opinion stating that "[a] panel of the . . . Circuit has recently held that claims raised under *Clemons* and *Maynard* are not available to a habeas petitioner whose conviction was final prior to these decisions, because they constitute a new rule of law under *Teague* [*v. Lane*, 489 U.S. 288 (1989)]." *Stringer v. Black*, 909 F.2d 111 (5th Cir. 1990).

The Fifth Circuit earlier concluded in *Smith v. Black*, 904 F.2d 950 (5th Cir. 1990), that this Court's decision

in *Clemons v. Mississippi* finding Mississippi's "automatic affirmnace" rule unconstitutional should not be given retroactive effect. 904 F.2d at 982-86.

SUMMARY OF ARGUMENT

This Court announced no new constitutional rule in deciding *Maynard v. Cartwright*, 486 U.S. 356 (1988), and *Clemons v. Mississippi*, 494 U.S. ——, 110 S.Ct. 1441 (1990). To the extent that the decision of the Fifth Circuit Court of Appeals denying James Stringer habeas relief is premised on a contrary view, it must be reversed.

It is unclear whether the Fifth Circuit meant to hold in this case that *Maynard v. Cartwight*, standing alone, is nonretroactive in habeas proceedings under *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny. No other court takes the view that *Cartwright* made new law, and for good reason. Since 1976, it has been a settled rule of Eighth Amendment jurisprudence that an aggravating circumstance phrased so vaguely that it provided inadequate guidance to the sentencer will not pass constitutional muster. The principle was stated in *Gregg v. Georgia*, 428 U.S. 153 (1976), and *Proffitt v. Florida*, 428 U.S. 242 (1976), and was applied in *Godfrey v. Georgia*, 446 U.S. 420 (1980), to condemn an aggravating circumstance couched only in terms of the "outrageously or wantonly vile, horrible and inhuman" nature of the killing. *Id.* at 428-29. *Cartwright* involved no extension of this old law, but rather applied it to facts slightly but not materially different than were at issue in *Godfrey*. In *Cartwright*, the aggravating circumstance was defined only in terms of the "especially heinous, atrocious or cruel" nature of the killing. Without some further, properly delimiting construction, such language could not pass the settled Eighth Amendment test.

Clemons v. Mississippi likewise announced no new constitutional rule and therefore applies to habeas corpus. Indeed, this Court applied *Clemons* in *Parker v. Dugger*,

498 U.S. ——, 111 S.Ct. 731 (1991), to the benefit of a habeas petitioner whose conviction became final, like James Stringer's, in 1985. Were *Clemons* new law, the Court would not have applied it in *Parker*; new rules are neither announced nor applied in habeas corpus, and any questions regarding retroactivity are addressed by the Court as a threshold issue. These requirements exist because they are essential to satisfy one of *Teague*'s underlying principles—that similarly situated individuals receive equal treatment. The petitioner in *Parker* and James Stringer are in all pertinent respects similarly situated. The same rules must be applied to both men.

This Court was right to apply *Clemons* retroactively in *Parker* because *Clemons* states no new rule. *Clemons* permits an appellate court to reweigh aggravating and mitigating circumstances or perform a harmless error test when, as in this case, the sentencer in a "weighing" jurisdiction has considered and relied on an unconstitutional aggravating circumstance. What *Clemons* condemned, however, is Mississippi's rule of "automatic affirmance" whenever the sentencer also found another valid aggravating circumstance—the rule of "automatic affirmance" which the Fifth Circuit respected in this case. A rule of "automatic affirmance" is unconstitutional, *Clemons* held, not because it violates a new rule or principle. It is unconstitutional because it is "invalid under *Lockett v. Ohio* and *Eddings v. Oklahoma* for it [does] not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." *Clemons*, 494 U.S. at ——, 110 S.Ct. at 1450 (citations omitted).

It has long been the rule that capital sentencing decisions must rest on an individualized determination, regardless of by whom that determination is made. If the decision is to rest on a state appellate court's asserted "cure" of constitutional error occurring at the trial level,

then the state appellate court must heed the mitigating circumstances present in the case. That was held in *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Later cases—*Zant v. Stephens*, 462 U.S. 862 (1983), *Barclay v. Florida*, 463 U.S. 939 (1983), and *Wainwright v. Goode*, 464 U.S. 78 (1983), similarly insisted that state appellate courts may not disregard the individual facts of the case when deciding to affirm a death sentence returned by a sentencer who relied on an invalid aggravating circumstance. What has always been of fundamental importance, even before James Stringer's case became final, "is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Barclay*, 463 U.S. at 958 (*quoting Zant*, 463 U.S. at 879) (emphasis in original). An "automatic affirmance" rule, by definition, ignores the individual facts and circumstances of a case and disregards mitigating circumstances entirely. As *Clemons* held, it violates constitutional law that was settled long before James Stringer's appeal reached the Mississippi Supreme Court.

Mississippi's curious and arbitrary procedure of ignoring the effect of constitutional defects on the sentencer's life or death determination finds little or no support from the practice of its sister states. State courts were aware, prior to *Clemons*, of their obligation to determine the effect of constitutional error on the sentencer's determination before sustaining a death sentence. Therefore, nothing in *Clemons* broke new ground or imposed a new obligation on the States.

ARGUMENT

I. THE "RULE" APPLIED IN *MAYNARD v. CARTWRIGHT* IS NOT NEW

James Stringer's sentencing jury was instructed that it could base a death sentence on a finding of the stautory aggravating circumstance that "the capital murder was especially heinous, atrocious or cruel." This language from the Mississippi statute, Miss. Code Ann. Section 99-19-101(5)(h), was not defined, limited, or explained in any way by the trial court. This instruction violated the fundamental tenet of Eighth Amendment jurisprudence that capital sentencers be adequately guided in their deliberations. In *Furman v. Georgia*, 408 U.S. 238 (1972), the Court held that the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner. *Gregg v. Georgia*, 428 U.S. 153 (1976), reaffirmed this holding:

> [W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Id. at 189 (opinion of Stewart, Powell and Stevens, J.J.); *accord Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (plurality opinion).

In 1976, this Court informed state courts that they must construe the "especially heinous, atrocious or cruel" aggrevating circumstance narrowly so as to provide adequate guidance to the sentencer. *Gregg*, 428 U.S. at 201; *Proffitt v. Florida*, 428 U.S. 242, 254-56 (1976). In *Proffitt*, this Court approved Florida's "especially heinous, atrocious or cruel" aggravating factor which was "directed only at 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim.'" *Id.* at 255. "We cannot say that the provision, *as so construed*, pro-

vides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases. *See Gregg v. Georgia, ante*, at 200-203." *Id.* at 255-56. (emphasis added).

In *Gregg*, the Court noted that Georgia's "outrageously or wantonly vile, horrible or inhuman" aggravating circumstance could arguably be applied to "any murder" but approved the Georgia statute on its face. *Gregg*, 428 U.S. at 201. In a footnote in *Gregg*, the Court then cited with approval Florida's narrow construction of the "especially heinous, atrocious or cruel" aggravating circumstance. 428 U.S. at 201 n.52.

By cross-referencing in this manner Florida's "especially heinous, atrocious or cruel" aggravating circumstance with Georgia's "outrageously or wantonly vile, horrible or inhuman" aggravating circumstances, this Court appeared to view the two statutory phrases as essentially indistinguishable. Both phrases, the Court held in 1976, could be given a limiting interpretation that was consistent with the requirements of *Furman*, but—at the same time—it clearly warned that neither phrase alone and without delimiting interpretation would satisfy the Eighth Amendment. Indeed, the *Gregg* plurality opinion specifically anticipated both *Godfrey v. Georgia*, 446 U.S. 420 (1980), and *Maynard v. Cartwright*, 486 U.S. 356 (1988), when it wrote: "[a] system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur." *Gregg*, 428 U.S. at 195 n.46.

Godfrey applied the rule of *Gregg* that a capital scheme "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" 446 U.S. at 428 (footnotes citing, *inter alia*, *Gregg* omitted).

At issue was whether the language of the aggravating circumstance that the offense was "outrageously or wantonly vile, horrible and inhuman" provided the sentencer those constitutionally requisite "clear and objective standards." As stated, the aggravating circumstance failed the test. The Court reasoned:

> there is nothing in [those] words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'

Id. at 428-29. The Court further rejected Georgia's argument that the review by the Georgia Supreme Court cured the error. The affirmance of the death sentence by the Georgia Supreme Court was held to be insufficient to remedy the jury's consideration of an unconstitutionally vague aggravating circumstance because that court failed to apply its previously recognized limiting construction of the aggravating circumstance.

In 1982, this Court in dictum applied *Godfrey* to Oklahoma's application of the "especially heinous, atrocious or cruel" aggravating circumstance. *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The death sentence in *Eddings* rested on the trial judge's finding that the crime was "heinous, atrocious and cruel" because "designed to inflect a high degree of pain . . . in utter indifference to the rights of Patrolman Crabtree." *Id.* at 108 n.3. While deciding the case on other grounds, the Court stopped to express its "doubt that the trial judge's understanding and application of this aggravating circumstance conformed to that degree of certainty required by our decision in *Godfrey v. Georgia*." *Id.* at 109 n.4.

The state courts similarly understood that the rule of *Godfrey* applied specifically to the "especially heinous, atrocious or cruel" aggravating circumstance, and appre-

ciated this fact well before this Court decided *Cartwright*.[3] *See, e.g., Ex Parte Kyzer*, 399 So.2d 330, 333-34 (Ala. 1981); *State v. Sonnier*, 402 So.2d 650, 658-60 (La. 1981); *State v. Pritchett*, 621 S.W.2d 127, 137-39 (Tenn. 1981); *Wilson v. State*, 295 Ark. 682, 685-89, 751 S.W.2d 734, 736-39 (1988); *Stouffer v. State*, 742 P.2d 562, 563-64 (Okl.Crim.App. 1987); *State v. Hamlet*, 312 N.C. 162, 176-77, 321 S.E.2d 837, 845-46 (N.C. 1984); *Hopkinson v. State*, 632 P.2d 79, 153-56 (1981); *People v. Superior Court of Santa Clara County*, 31 Cal.3d 797, 183 Cal.Rptr. 800, 647 P.2d 76 (1982); *see also, State v. Osborn*, 102 Idaho 405, 417-19, 631 P.2d 187, 200-01 (1981) (applying *Godfrey* to the aggravating circumstance "the murder was especially heinous, atrocious, or cruel manifesting exceptional depravity"); *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982) (applying *Godfrey* to the aggravating circumstance "the murder was especially heinous atrocious or cruel or manifested exceptional depravity by ordinary standards of morality and intelligence."); *State v. Gretzler*, 135 Ariz. 42, 50-53, 659, P.2d 1, 9-12 (1983) (applying *Godfrey* to "especially heinous, cruel or depraved" aggravating circumstance); *State v. Wood*, 648 P.2d 71, 85-86 (Utah 1982) (applying *Godfrey* to aggravating circumstance that the homicide involved "ruthlessness and brutality"); *Com. v. Nelson*, 523 A.2d 728 (Pa. 1987) (applying *Godfrey* to the aggravating circumstance "the offense was committed by means of torture.") Even the Mississippi Supreme Court at one point acknowledged that "[a]bsent a requirement that the jury be instructed as to the specific meaning of 'especially

---

[3] According to one commentator, it is appropriate to analyze the various "especially heinous" aggravating circumstances in state death penalty enactments under a single rubric because "even state court judges, in discussing their particular state's 'especially heinous' aggravating circumstances, have tended to ignore the differences between the specific terminology used in the individual state statutes." R. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C.L. Rev. 941, 943 n.8 (1986).

heinous, atrocious or cruel' the mandate of *Godfrey* is not met." *Mhoon v. State*, 464 So.2d 77, 85 (Miss. 1985).

It was this same rule, drawn from *Furman*, *Gregg* and *Proffitt*, and applied in *Godfrey* and *Eddings*, that this Court again applied in 1988 in *Maynard v. Cartwright*, 486 U.S. 356 (1988). There, the Court forthrightly stated: "*Godfrey* controls this case." 486 U.S. at 363.[4] And *Godfrey*, the Court observed in *Cartwright*, merely applied the "central tenet of Eighth Amendment law" stating a 'fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." 486 U.S. at 362.

Cartwright did no more than apply the settled principle of *Godfrey* to a slightly, but not materially, different set of facts, *see Butler*, —— U.S. at ——, 110 S.Ct. at 1217 ("mere application to a slightly different set of facts" is not a new rule); *Yates v. Aiken*, 484 U.S. 211 (1988) ("mere application" [of *Sandstrom* principle] to a slightly different legal question is not a new rule); *cf. United States v. Johnson*, 457 U.S. 537, 549 (1982) ("[W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way."). The *Cartwright* Court found that the language "especially heinous, atrocious or cruel" gave no more guidance than

[4] To be sure, *Butler v. McKellar*, —— U.S. ——, ——, 110 S.Ct. 1212, 1217 (1990), teaches that expressions like "control" do not automatically preclude a finding that a decision of this Court has announced a new constitutional rule for *Teague* purposes. On the other hand, when the Court states specifically that a precedent is "controlling," one surely cannot conclude that this is simply a disingenuous or naive protestation that the Court is "merely finding law" when it is actually making law.

the "outrageously or wantonly vile, horrible or inhuman" language in *Godfrey*. Moreover, the Oklahoma Court's review of the especially heinous, atrocious or cruel aggravating circumstance was "indistinguishable" from the action of the Georgia Court in *Godfrey*, which failed to cure the unfettered discretion of the jury and to satisfy the commands of the Eighth Amendment. Throughout the *Cartwright* opinion, the Court consistently treats the only real issue to be decided as whether Oklahoma decisional law had—as the Tenth Circuit held—failed to delimit Oklahoma's "especially heinous, atrocious or cruel" aggravating circumstance sufficiently to save it from the rule of *Godfrey*. Nowhere does the Court suggest that the constitutional rule of *Godfrey* is being extended or elaborated in the slightest.

Because the rule employed by the Court was identical, and the outcome the same for the same reasons, *Godfrey* dictated *Maynard v. Cartwright*. No subsequent developments in the law set forth in *Godfrey* were necessary to the result in *Cartwright*. *See Sawyer v. Smith*, —— U.S. ——, ——, 110 S.Ct. 2822, 2827 (1990) ("The principle announced in *Teague* serves to ensure that gradual development in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered"). Rather, the precise holding of *Godfrey*, without more, dictated the result in *Cartwright* because there was no material difference between the vague language struck down in *Godfrey* and the vague language struck down in *Cartwright*.

The applicability of *Godfrey* was not open to debate among reasonable minds. *See Butler*, —— U.S. at ——, 110 S.Ct. at 1217 (rule new if "significant difference of opinion on the part of several lower courts"). Every court to consider the retroactivity of *Maynard v. Cartwright* has reached the conclusion that it was dictated by *Godfrey*. The Eighth Circuit so held in *Newlon v. Armontrout*, 885 F.2d 1328, 1333 (8th Cir. 1989) (*Cartwright* is dictated by *Godfrey* and is therefore not a "new rule"

for purposes of *Teague v. Lane*). The Tenth Circuit so held in *Davis v. Maynard*, 911 F.2d 415, 418 (10th Cir. 1990) (*Godfrey*, decided three years before Davis's conviction became final, clearly dictated the Tenth Circuit's own holding in *Cartwright*, which was affirmed by this Court; Tenth Circuit did not create a new rule under *Teague* and *Penry*). The Fifth Circuit has never clearly addressed this question, and it is uncertain whether it intended to do so in Stringer's case. *See Hill v. Black*, 932 F.2d 369, 373 (5th Cir. 1991) (while leaving open the question of the retroactivity of *Cartwright*, the court concludes, "as did the Eighth Circuit in *Newlon*, that *Maynard* is simply an application of *Godfrey*, rather than a significant extension of it"); *Smith v. Black*, 904 F.2d 950, 983 n.14 (5th Cir. 1990) (leaving open the question concerning the retroactivity of *Cartwright*). *Cartwright* also has been applied retroactively, without explicit analysis of retroactivity, to cases in habeas proceedings by the Fourth, Ninth and Eleventh Circuits. *See Coleman v. Thompson*, 895 F.2d 139, 147 (4th Cir. 1990); *Creech v. Arave*, 928 F.2d 1481, 1491-1492 (9th Cir. 1991); *Lindsey v. Thigpen*, 875 F.2d 1509, 1513-15 (11th Cir. 1989).

Indeed, in *Lewis v. Jeffers*, —— U.S. ——, 110 S.Ct. 3092 (1990), this Court applied *Cartwright* in habeas corpus to a case final before *Cartwright* was decided. Jeffers relied on *Cartwright* and *Godfrey* to argue that Arizona's "especially heinous, cruel, or depraved" aggravating circumstances was unconstitutionally vague as applied to him. Arizona's aggravating circumstance more nearly resembled Oklahoma's "especially heinous, atrocious and cruel" aggravating circumstance than it did Georgia's "outrageously or wantonly vile, horrible or inhuman" aggravating circumstance. This Court applied *Cartwright* while rejecting Jeffers's claim. *Jeffers*, —— U.S. at ——, 110 S.Ct. at 3100 ("Respondent's reliance on *Godfrey* and *Cartwright* does not yield the result he seeks"). The State of Arizona specifically raised the retroactivity of *Cartwright in Lewis v. Jeffers* (Transcript of Oral Argument at 16). Given the *Teague* requirement that retroactivity *must* be considered as a threshold question, even if not raised by the parties, the Court's refusal to address retroactivity in response to the State's invitation demonstrates that the rule of *Cartwright* is not new for retroactivity purposes.[5]

Nor is this surprising, for there is an exact parallel between the way in which *Jurek v. Texas*, 428 U.S. 262 (1976), controlled the holding in *Penry v. Lynaugh*, 492 U.S. 302 (1989), and the way in which the *Gregg/Proffitt/Godfrey* line of cases controlled the holding in *Cartwright*. In *Jurek*, the Court upheld the Texas capital sentencing statute on its face upon the expressly stated predicate that the statute could be determined in a certain way not demanded by its language but consistent with its then-extant treatment by the state courts. When the state courts in *Penry* disregarded *Jurek's* predicate, this Court reaffirmed it as a holding, recognizing that to do so involved no announcement of a new rule but simply due respect for "the assurance[s] upon which *Jurek* was based." *Penry*, 492 U.S. at 315. Similarly, *Gregg* and *Proffitt* upheld statutory variations of the "heinous, atrocious or cruel" aggravating circumstance on their face upon the expressly stated predicate that such statutes could be limited by a narrowing interpretation that would meet the "channeling" requirement of *Furman*. The only difference between the two situations is that after *Gregg* and *Proffitt* but before *Cartwright*, *Godfrey* had already converted *Gregg's* and *Proffitt's* predicate into a square constitutional holding. *Godfrey* makes the present case manifestly easier than *Penry* as an instance of a holding dictated by any fair reading of precedent, for it is plain that from *Gregg* and *Proffitt* through *Godfrey* and *Cartwright* to *Jeffers*, *Clemons* and *Shell v. Mississippi*, —— U.S. ——, 111 S.Ct. 313 (1990) (per curiam), the Eighth

[5] This Court neither announces nor applies new rules in a post-conviction context. See the retroactivity discussion in Section IIA below.

Amendment rule has been explicit and unchanged: "heinous, atrocious or cruel" language can pass constitutionual muster if—but only if—it is subjected to some properly delimiting interpretation.[6]

II. THE REQUIREMENT THAT AN APPELLATE COURT MUST REVIEW THE FACTS AND CIRCUMSTANCES OF THE INDIVIDUAL CASE TO CURE CONSTITUTIONAL ERROR IN A CAPITAL SENTENCING PROCEEDING IS NOT A NEW RULE UNDER *TEAGUE v. LANE*

A. *Teague v. Lane* Requires This Court Apply to James Stringer the Eighth Amendment Rule Applied in *Clemons v. Mississippi* Because That Rule Has Been Applied Retroactively by This Court in *Parker v. Dugger*

Earlier this year, this Court granted Robert Parker relief in habeas corpus. Parker's conviction and death sentence became final in 1985, the same year as did James Stringer's. He was granted habeas relief because the Florida Supreme Court's affirmance of the death sentence "was invalid because it deprived Parker of the individualized treatment to which he is entitled under the Constitution. *See Clemons* [*v. Mississippi*], . . . 494 U.S. [ ], at ——, 110 S.Ct. [1441], at ——." *Parker v. Dugger*, 498 U.S. ——, ——, 111 S.Ct. 731, 740 (1991). In so holding, the Court directly and unequivocally ap-

[6] *See also Walton v. Arizona*, —— U.S. ——, ——, 110 S.Ct. 3047, 3057 (1990): "[I]n both *Maynard* and *Godfrey* the defendant was sentenced by a jury and the jury either was instructed only in the bare terms of the relevant statute or in terms nearly as vague . . . . Neither jury was given a constitutional limiting definition of the challenged aggravating factor. . . . It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in *Maynard* and *Godfrey*. . . . In this case there is no serious argument that Arizona's 'especially heinous, cruel or deprived' aggravating factor is not facially vague. But the Arizona Supreme Court has sought to give substance to the operative terms, and we find its construction meets constitutional requirements."

plied *Clemons v. Mississippi*, 494 U.S. ——, 110 S. Ct. 1441 (1990), thus giving *Clemons* retroactive application to a habeas petitioner. The United States Court of Appeals for the Fifth Circuit treated James Stringer differently from how this Court treated Parker by refusing to apply *Clemons*.[7] This Court's application of *Clemons* in *Parker* resolves the question of the retroactivity of *Clemons* to cases pending in post-conviction proceedings. Moreover, the interest in even-handed justice that underlies *Teague* requires that James Stringer be afforded the benefit of the rule applied to a similarly situated defendant.

This Court neither announces nor applies "new" rules in post-conviction proceedings and accordingly considers retroactivity as a threshold question in every habeas case. "[H]abeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be retroactively applied to *all* defendants on collateral review through one of the two exceptions we have articulated." *Teague v. Lane*, 489 U.S. 288, 316 (1989).

The Court reiterated this principle in the post-conviction case of *Saffle v. Parks*, —— U.S. ——, ——, 110 S.Ct. 1257, 1259-60 (1990): "we must first determine whether the relief sought would create a new rule under *Teague* and *Penry*. . . [i]f so, we will neither announce nor apply the new rule sought by Parks unless it would fall into one of two narrow exceptions." (citations omitted). *See also Penry v. Lynaugh*, 492 U.S. 302, 313 (1989) ("we must determine, as a threshold matter, whether granting [Penry]the relief he seeks would cre-

[7] The lower court's decision in this case was made without benefit of this Court's decision in *Parker*. Since then, the Fifth Circuit has modified a prior opinion by withdrawing its reliance on the nonretroactivity of *Clemons v. Mississippi*, 110 S.Ct. 1441 (1990). *Hill v. Black*, 932 F.2d 369 (5th Cir. 1991) (assuming, without deciding, that *Clemons* is retroactive, thereby modifying prior opinion at 920 F.2d 249 (5th Cir. 1990)).

ate a 'new rule' [because] [u]nder *Teague*, new rules will not be applied or announced in cases on collateral review"); *Butler v. McKellar*, —— U.S. ——, ——, 110 S.Ct. 1212, 1214 (1990) ("a new decision generally is not applicable in cases on collateral review unless the decision was dictated by precedent existing at the time the petitioner's conviction became final"); *Sawyer v. Smith*, —— U.S. ——, 110 S.Ct. 2822 (1990) (addressing only threshold question whether *Caldwell v. Mississippi*, 472 U.S. 320 (1985), announced new constitutional rule).[8]

As this Court has made clear, the need for evenhanded application of rules of law to all similarly situated defendants dictates this "threshold consideration" requirement.[9] The principle that litigants in similar situations should be treated the same is "a fundamental component of *stare decisis* and the rule of law generally." *James B. Beam Distilling Co. v. Georgia*, —— U.S. ——, ——, —— S.Ct. ——, —— (1991). The Court observed in *Teague* that " 'the integrity of judicial review' requires the application of the new rule to 'all similar cases pending on direct review' " and "because 'selective application

[8] Even in *Collins v. Youngblood*, —— U.S. ——, ——, 110 S.Ct. 2715, 2718 (1990), the Court faced the issue of retroactivity as a threshold matter. The Court resolved the issue by accepting the State's express waiver of the defense of retroactivity during oral argument.

[9] Justice Harlan provided a steady and clear voice in support of the proposition that retroactivity must incorporate the principle that similarly situated litigants be treated alike. He reasoned: "Simply fishing one case from the stream of appellate review . . . then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute[s] an indefensible departure from [the constitutional model] of judicial review." *Mackey v. United States*, 401 U.S. 667, 679 (1971) (Harlan, J., concurring and dissenting). *See also Desist v. United States*, 394 U.S. 244, 258-59 (1969) (Harlan, J., dissenting).

In *Teague*, the Court firmly adopted Justice Harlan's position. 489 U.S. at 310; *see also Penry v. Lynaugh*, 492 U.S. 302, 313 (1989).

of new rules violates the principle of treating similarly situated defendants the same,' we refused to continue to tolerate the inequity that resulted from not applying new rules retroactively to defendants whose cases had not yet become final." *Teague*, 489 U.S. at 304, (*quoting Griffith v. Kentucky*, 479 U.S. 314, 323-24 (1987)).[10]

Likewise, the Court will not tolerate disparity in the treatment of similarly situated defendants on collateral review:

> Were we to recognize the new rule urged by petitioner in this case, we would have to give petitioner the benefit of that new rule even though it would not be applied retroactively to others similarly situated . . . *the harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated*: such inequitable treatment "hardly comports with the ideal of 'administration of justice with an even hand.' "

Teague, 489 U.S. at 315 (emphasis added) (quoting *Hankerson v. North Carolina*, 432 U.S. 233, 247 (1977) (Powell, J., concurring)).

This Court is obviously aware of its duty to treat retroactivity as a threshold issue, having recognized the obligation in at least five cases in the last two terms and having said that it is indispensable to evenhanded treatment of habeas petitioners.[11] The Court must therefore be pre-

[10] Justice O'Connor, writing for a plurality in *American Trucking Associations Inc. v. Smith*, —— U.S. ——, 110 S.Ct. 2323 (1990), noted: "*Griffith* relied on what, in essence, was a single justification: that it was unfair to apply different rules of criminal procedure to two defendants whose cases were pending on direct review at the same time." *Id.* at ——, at 2341.

[11] Certainly, the Court below was acutely cognizant of the mandate from this Court to treat retroactivity as a threshold issue. For this reason, in *Smith v. Black*, 904 F.2d 950 (5th Cir. 1990), decided after *Clemons* but before *Parker*, the Fifth Circuit addressed a question to the litigants concerning the retroactivity of this Court's decision in *Clemons*, although the issue had not been raised by

sumed to have acted in accordance with the normal rule applied in federal habeas cases since the announcement of *Teague's* "threshold consideration" requirement in 1989, when, just last Term, it applied *Clemons v. Mississippi* retroactively in the federal habeas context in *Parker v. Dugger*, 498 U.S. ——, 111 S.Ct. 731 (1991). Although members of the Court differed over whether the principles of *Clemons* and its predecessors required a judgment for Parker, *all nine Justices* applied *Clemons* on the merits and none raised the possibility that *Clemons* should not apply retroactively.[12] *Parker* thus makes clear that *Clemons* did not state a new rule and is fully applicab'e on federal habeas.

In *Parker*, the Florida Supreme Court found two of six aggravating circumstances relied on by the sentencing judge to be invalid under state law. *Parker v. State*, 458 So.2d 750, 754 (1984). The state court nevertheless affirmed the death penalty, noting only that "[t]he trial court found no mitigating circumstances to balance against the aggravating circumstances." *Id.* This Court found this conclusion by the Florida Supreme Court "not fairly supported by the record in this case." *Parker v. Dugger*, 498 U.S. at ——, 111 S.Ct. at 739.

---

either party. Counsel for the State of Mississippi had not raised the issue of retroactivity of *Clemons* in any proceeding before then and had declined to raise the issue in its supplemental brief in James Stringer's case in this Court following the *Clemons* decision. State's Supplemental Brief in Opposition to Certiorari, *Stringer v. Black*, No. 88-7000 at page 8.

[12] The lower courts, with the exception of the Fifth Circuit, have respondend similarly by assuming without discussion the retroactivity of *Clemons*. *See e.g., Creech v. Arave*, 928 F.2d 1481, 1493 (9th Cir. 1991) (applying *Clemons* to require granting of writ); *Booker v. Dugger*, 922 F.2d 633, 636-46 (11th Cir. 1991) (Tjoflat, C.J., concurring) (applying *Clemons* to treatment of *Hitchcock* error); *Richmond v. Lewis*, 921 F.2d 933, 947 (9th Cir. 1990) (analyzing *Clemons* and determining it does not apply to Arizona); *Carbray v. Champion*, 905 F.2d 314, 318 (10th Cir. 1990) (*Clemons* applied to state appellate court's reduction of sentence within statutory limit in non-capital case).

The Florida Supreme Court chose not to independently reweigh aggravating and mitigating circumstances. That court affirmed Parker's death sentence "neither based on a review of the individual record in this case nor in reliance on the trial judge's findings based on that record." *Id.* at ——, at 740. Although the Florida Supreme Court's review could have been construed as a harmless error test, the Court's failure to independently consider mitigating circumstances found by the trial judge was fatal to Parker's sentence of death. The Florida Supreme Court's review as applied to Parker resembled in most respects a rule of "automatic affirmance".

The *Parker* majority drew the following rule from *Clemons* and the pre-*Clemons* precedents (*Lockett*, *Eddings*, *Barclay* and *Goode*, discussed *infra*):

> Following *Clemons*, a reviewing court is not compelled to remand [after striking one or more invalid aggravating circumstances]. It may instead reweigh the evidence or conduct a harmless error analysis based on what the sentencer found. What the Florida Supreme Court could not do, but what it did, was to ignore the evidence of mitigating circumstances in the record and misread the trial judge's findings regarding mitigating circumstances, and affirm the sentence based on a mischaracterization of the trial judge's findings.

Id. at ——, at 739.[13]

The dissent in *Parker* also applied the Eighth Amendment rule of *Clemons* and its forebears, but came to a different result. The dissent agreed that if the Florida Supreme Court's interpretation of the trial court's miti-

---

[13] The *Parker* majority also relied on a rule that was not central to the Court's decision in *Clemons*. The improper aggravating circumstances considered by the trial judge violated state law but not the federal constitution. The Court's decision in *Parker* was justified in part because of the "crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." 498 U.S. at ——, 111 S.Ct. at 739.

gating findings was not "plausible," then that court's action in affirming Parker's death sentence would present a problem under *Barclay v. Florida*, 463 U.S. 939 (1983), and *Clemons v. Mississippi*. *Parker v. Dugger*, 498 U.S. at ——, 111 S.Ct. at 746, n.7 (White, J, dissenting). However, the dissenting justices found "nothing implausible about the interpretation the Florida Supreme Court gave to the trial court's findings." *Id.* at ——, at 743.[14]

James Stringer and Robert Parker are, without doubt, similarly situated from the standpoint of every feature that either the majority or the dissent in *Parker* saw as calling for the application of *Clemons* to Parker's case.[15] The Court below found that the Mississippi Supreme Court employs a rule of automatic affirmance, just as this Court found that "there is a sense in which the [Florida Supreme] Court did not review Parker's sentence at all." *Parker*, 498 U.S. at ——, 111 S.Ct. 739. In both cases,

---

[14] Furthermore, the dissent rejected an Eighth Amendment right to "meaningful appellate review" to be applied by federal courts regardless of constitutional error at trial. *Parker*, 498 U.S. at ——, 111 S.Ct. at 742-43 (White, J., dissenting).

[15] The differences in their cases favor Stringer. First, the appellate review which deprived Parker of individualized treatment was occasioned by the sentencing judge's reliance on aggravating circumstances suspect only as a matter of state law. Here, the appellate review which deprives Stringer of individualized treatment is occasioned by the sentencing jury's reliance on a *constitutionally invalid* aggravating circumstance. Thus, unlike in *Parker*, it is not "difficult to see how any 'error' here could have been of federal constitutional dimension." *Parker*, 498 U.S. at ——, 111 S.Ct. at 743 (White, J., dissenting). Second, Parker's appellate review ran afoul of the individualization requirement because the state court erred in its effort to determine the various individualized factors that were found and weighed by the sentencer. The Mississippi Supreme Court, by contrast, did not even attempt to determine the various individualized factors brought into the balance by the jury. Mississippi's automatic affirmance rule intentionally disregards the facts of the case; in *Parker*, the state court could at least plead negligence as to the facts.

then, appellate review by the state court operates to deprive the defendant of "the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." *Clemons*, 494 U.S. at ——, 110 S.Ct. at 1450. *Accord Parker*, 498 U.S. at ——, 111 S.Ct. at 740.

Therefore, because this Court has applied *Clemons v. Mississippi* retroactively, and because similarly situated defendants must be treated alike, the Court's decision in *Parker* controls this case.[16] Moreover, as demonstrated below, the Court's retroactive application of *Clemons v. Mississippi* in *Parker* was plainly justified.

B. *Clemons v. Mississippi* Announced No New Rule

The "rule" which the State of Mississippi now claims is "new" was the application of established Eighth Amendment principles stated in *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), *Barclay v. Florida*, 463 U.S. 939 (1983), and *Wainwright v. Goode*, 464 U.S. 78 (1983) (per curiam), to a state appellate court which exercises the power to cure constitutional error by reweighing aggravating and mitigating circumstances.[17] According to this Court, the Mississippi

---

[16] Even were this Court inclined to decide the *Clemons* retroactivity issue differently as a matter of first impression, it is bound by its previous decision to apply *Clemons* to the habeas petitioner in *Parker*. This Court's affirmative decision to apply *Clemons* retroactively is "water over the dam, irretrievably . . ." *James Beam Distilling Co. v. Georgia*, —— U.S. —— (1991) (White, J. concurring). *See also id.*, slip op. at 13 (Souter, J., announcing the judgment) ("when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or *res judicata*.").

[17] If there was a new rule announced in *Clemons*, it was one beneficial to the State, and succinctly summarized by this Court in *Parker v. Dugger*, 498 U.S. ——, ——, 111 S.Ct. 731, 739 (1991): "Following *Clemons*, a reviewing court [in a so-called 'weighing' jurisdiction] is not compelled to remand. It may instead reweigh the evidence or conduct a harmless error analysis based on what the

Supreme Court "asserted its authority under Mississippi law to decide for itself whether the death sentence was to be affirmed even though one of the two aggravating circumstances on which the jury had relied should not have been or was improperly presented to the jury." *Clemons*, 494 U.S. at ——, 110 S.Ct. at 1447.[18] This interpretation of the role of the appellate court under Mississippi law was "considered by the [Mississippi Supreme Court] to be distinct from its asserted authority to affirm the sentence on the ground of harmless error." *Id.* at 1447.[19]

---

sentencer actually found." *See also Booker v. Dugger*, 922 F.2d 633, 642 (11th Cir. 1991) (Tjoflat, C.J., concurring) (*Clemons* stands for the proposition that state courts in weighing states may act as sentencers). Because no "new obligation" was imposed on the states by this rule, which arguably involved an expansion of the state appellate court's powers, the retroactivity principles of *Teague* are not implicated.

[18] The Mississippi Supreme Court stated in *Clemons v. State*, 535 So.2d 1354 (Miss. 1988), that "this Court has held and established unequivocally through the years that when one aggravating circumstance is found to be invalid or unsupported by the evidence, a remaining valid aggravating circumstance will nonetheless support the death verdict." *Id.* at 1362.

[19] *Clemons* suggests two ways an appellate court may seek to "cure" constitutional error occurring in the sentencing phase of a capital case. The State appellate court may either independently determine the sentence by reweighing valid aggravating and mitigating circumstances, or find that the error which occurred during the sentencing proceeding was harmless beyond a reasonable doubt. *Clemons v. Mississippi*, 494 U.S. ——, ——, 110 S.Ct. 1441, 1448-51 (1990). In James Stringer's case, as in *Clemons*, a conclusion of harmless error would be "difficult to accept". *Id.* at ——, at 1451. The State repeatedly emphasized the "especially heinous" factor during the sentencing hearing to the extent of showing color slides of the corpse of the victim to the jury during closing argument and asking jurors, "Is that atrocious? Is that cruel?" (T-1370-71, 1373-74, 1377-78). Also, as in *Clemons*, the State placed little emphasis on the other aggravating circumstances. Moreover, the mitigating evidence tells a compelling story of a fifty-year-old veteran who contributed much to society and who suffered greatly prior to his involvement in this crime.

Clemons argued that "appellate courts are unable to fully consider and give effect to mitigating evidence presented by defendants at the sentencing phase in a capital case and that it therefore violates the Eighth Amendment for an appellate court to undertake to reweigh aggravating and mitigating circumstances in an attempt to salvage the death sentence imposed by a jury." *Id.* at ——, at 1448. The Court acknowledged that the "primary concern in the Eighth Amendment context has been that the sentencing decision be based on facts and circumstances of the defendant, his background, and his crime." *Id.* at ——, at 1448 (citations omitted). But the Court found that "nothing inherent in the process of appellate reweighing" is inconsistent with the pursuit of the "'twin objectives' of 'measured consistent application and fairness to the accused.'" *Id.* (*quoting Eddings*, 455 U.S. at 110-11). The Court concluded that state appellate courts "can and do give each defendant an individualized and reliable sentencing determination based on the defendant's circumstances, his background, and the crime." *Clemons*, 494 U.S. at ——, 110 S.Ct. at 1449.

The Court nevertheless found itself unable to uphold Clemons's death sentence. Although the Mississippi Supreme Court *might* have salvaged the sentence from the *Cartwright* error committed when Clemons's jury was instructed in the unlimited language of Mississippi's "especially heinous, atrocious or cruel" aggravating circumstance, it could do this only by finding the instructional error harmless (beyond a reasonable doubt) or by redetermining Clemons's sentence independently on appeal. Either constitutionally valid approach would have required some form of consideration of mitigating circumstances. The Mississippi Supreme Court's opinion reflected neither approach with clarity nor reflected any consideration of mitigating circumstances at all; thus it could not constitutionally support affirmance of Clemons's death sentence.

In so holding, *Clemons* merely applied the time-honored rule of *Lockett* v. *Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), that a criminal defendant in a capital proceeding is entitled to individualized consideration of all factors relevant to his background, history, and circumstances of the crime.[20] The rule applies regardless of whether the ultimate sentencing decision is being made by a jury, *Lockett v. Ohio*, 438 U.S. at 605, a trial judge, *Spaziano v. Florida*, 468 U.S. 447, 459 (1984), or a state appellate court, *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982); *Barclay v. Florida*, 463 U.S. 939, 958 (1983). The Court in *Clemons* recognized that Mississippi's rule of "automatic affirmance," which by definition involves no "individualized and reliable sentencing determination based on the defendant's circumstances, his background and the crime," violates *Lockett*, *Eddings* and *Barclay*:

> [A]lthough [the relevant passage from the Mississippi Supreme Court's opinion] does not necessarily indicate that no reweighing was undertaken, the court's statement can be read as a rule authorizing or requiring affirmance of a death sentence so long as there remains at least one valid aggravating circumstance. If that is what the Mississippi Supreme Court meant, then it was not conducting appellate

[20] Both *Lockett* and *Eddings* involved restrictions on capital sentencers' or state appellate courts' consideration of mitigating circumstances, restrictions condemned by the United States Supreme Court in 1976. *See, e.g., Roberts v. Louisiana*, 428 U.S. 325, 333 (1976) (criticizing "[t]he constitutional vice of . . . lack of focus on . . . the character and propensities of the offender . . . ."); *Jurek v. Texas*, 428 U.S. 262, 273-74 (1976) ("as in Georgia and Florida, the Texas capital sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the . . . individual offender before it can impose a death sentence"); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (invalidating a mandatory death penalty statute which failed to permit consideration of the "character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death").

reweighing as we understand the concept. An automatic rule of affirmance in a weighing State would be invalid under *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), for it would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances. Cf. *Barclay v. Florida*, 463 U.S. 939, 958, 103 S.Ct. 3418, 3429, 77 L.Ed.2d 1134 (1983). Additionally, because the Mississippi Supreme Court's opinion is virtually silent with respect to the particulars of the allegedly mitigating evidence presented by Clemons to the jury, we cannot be sure that the court fully heeded our cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence. We must, therefore, vacate the judgment below, and remand for further proceedings, insofar as the judgment below purported to rely on the State Supreme Court's reweighing of aggravating and mitigating circumstances. Cf. *Cabana v. Bullock*, 474 U.S. at 390-392, 106 S.Ct. at 699-700 (1986).

Clemons, 494 U.S. at ——, 110 S.Ct. at 1450.

As the Court emphasizes in *Clemons*, there is nothing new about the requirement of individualized sentencing in capital cases, which has been the "primary concern in the Eighth Amendment context". *Id.* at ——, at 1448. The rule well predates the time when James Stringer's case was final in 1985. "Th[e United States Supreme] Court's decisions in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), were rendered before his conviction became final. Under the retroactivity principles adopted in *Griffith v. Kentucky*, 479 U.S. 314 (1987), Petitioner is entitled to the benefit of those decisions." *Penry v. Lynaugh*, 492 U.S. 302, 314-15 (1989).

In *Lockett*, the Court considered a statute which permitted sentencer consideration of some mitigating aspects

of a defendant's background, but not others. The Court responded with an emphasis on individualized sentencing in capital cases:

> Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. . . . The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence . . . [A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.

Lockett, 438 U.S. at 605.

There also is nothing new about the requirement that appellate courts necessarily must examine the facts and circumstances of the individual case to cure constitutional error occurring at a capital sentencing hearing. The rule was applied in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), to a claim by the State of Oklahoma that review by a state appellate court cured constitutional error which occurred at the sentencing phase of trial. In *Eddings*, the trial judge ruled that in "following the law" he could not consider the mitigating effect of Edding's tumultuous family history. *Id.* at 112-13. The Court of Criminal Appeals also failed to consider evidence of family history, finding that this "evidence in mitigation was not relevant because it did not tend to provide a legal excuse from criminal responsibility." *Id.* at 113. This Court held that "[t]he sentencer, *and the Court of Criminal Appeals on review*, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from consideration." *Id.* at 114-15 (emphasis added). The Court concluded

that "the state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances. We do not weigh the evidence for them." *Id.* at 117. This holding by the court in *Eddings* dictates the rule applied in *Clemons* and *Parker* forbidding "automatic affirmance" despite error at trial.

The dissenting justices in *Eddings* agreed that it was necessary for the Court of Criminal Appeals to consider the mitigating evidence to cure the purported error by the trial judge, but disagreed whether such consideration took place.[21] Chief Justice Burger rejected the plurality's conclusion that mitigating evidence had not been considered by the state appellate court:

> The Oklahoma Court of Criminal Appeals independently examined the evidence of "aggravating and mitigating" factors presented at Eddings' sentencing hearing. 616 P.2d 1159 (1980). . . . The Court of Criminal Appeals most assuredly did *not*, as the Court's opinion suggests, hold that this "evidence in mitigation was not relevant," see *ibid.*; indeed, had the Court of Criminal Appeals thought the evidence irrelevant, it is unlikely that it would have spent several paragraphs summarizing it. The Court's opinion offers no reasonable explanation for its assumption that the Court of Criminal Appeals considered itself bound by some unstated legal principle not to "consider" Eddings background.

Eddings, 455 U.S. at 125-26 (Burger, C.J., dissenting). Chief Justice Burger found that "[t]wo Oklahoma courts have weighed the evidence and found it insufficient to offset the aggravating circumstances shown by the State." *Id.* at 127.

---

[21] Justice O'Connor stated in a concurring opinion that "we may not speculate as to whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors and found them insufficient to offset the aggravating circumstances, . . . *Woodson* and *Lockett* require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court." *Eddings*, 455 U.S. at 119 (O'Connor, J., concurring).

The lessons of *Eddings* are apparent. Every member of this Court agreed that if a state appellate court is to cure constitutional error occurring at the sentencing phase of trial it must consider and give effect to evidence in mitigation. The appellate court must weigh all relevant and valid mitigating and aggravating factors, or perform an individualized review of the error in which mitigating evidence is taken into account. An appellate court which considers itself bound by legal principle not to consider evidence in mitigation fails to cure trial court error.

It was thus black letter Eighth Amendment law at the time of Petitioner's trial and appeal that an appellate court which attempts to cure constitutional error in the sentencer's weighing decision must independently consider all evidence on the "mitigation" side of the scale, or, alternatively, perform a harmless error review which similarly heeds mitigating circumstances in the case. As in *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989), the Court's "reasoning in *Lockett* and *Eddings* . . . compels a remand for resentencing." *See also Saffle v. Parks*, —— U.S. at ——, 110 S.Ct. at 1262 (*Penry* "did not require the creation of a new rule" because it simply applied in a different context the "*Lockett* and *Eddings* command that the State must allow the jury to give effect to mitigating evidence in making the sentencing determination"). Thus, *Clemons v. Mississippi* did not "announce a new rule but was 'merely an application of the principle that governed [the] decision[s]'" in *Lockett* and *Eddings*. *Penry*, 492 U.S. at 314, (*quoting Yates v. Aiken*, 484 U.S. 211, 216-217 (1988)).

Long before *Eddings*, this Court required state appellate review of vague aggravating circumstances that may have affected the sentencing determination. In *Proffitt v. Florida*, 428 U.S. 242 (1976), a plurality of this Court put states on notice that individualized appellate review would be required to "assure that the death penalty will not be imposed in an arbitrary or capricious manner."

428 U.S. at 253 (plurality opinion of Stewart, Powell, and Stevens, JJ.). The risk of arbitrary and capricious imposition of the death penalty was "minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida to determine independently whether the imposition of the ultimate penalty is warranted." *Id.*

In *Proffitt*, the Court considered a claim that one of many aggravating factors found by the trial judge, that "[t]he defendant knowingly created a great risk of death to many persons," was vague and overbroad on its face. The Court noted that this provision was not impermisssibly vague as construed by the Supreme Court of Florida in previous cases. The Court then rejected the contention that the application under the facts of Proffitt's case necessarily broadened the construction of the aggravating circumstance in an unconstitutional manner. According to the Court:

> While it may be argued that this case broadens that construction, since only one person other than the victim was attacked at all and then only by being hit with a fist, this would be to read more into the State Supreme Court's opinion than is actually there. That court considered 11 claims of error advanced by the petitioner, including the trial judge's finding that none of the statutory mitigating circumstances existed. It did not, however, consider whether the findings as to each of the statutory aggravating circumstances were supported by the evidence. If only one aggravating circumstance had been found, or if some mitigating circumstance had been found to exist but not to outweigh the aggravating circumstances, we would be justified in concluding that the State Supreme Court had necessarily decided this point even though it had not expressly done so. However, in the circumstances of this case, when four separate aggravating circumstances were found and where each mitigating circumstance was expressly found

> *not* to exist, no such holding on the part of the State Supreme Court can be implied.

Id. at 256 n.13. (emphasis added). The Court allowed the Supreme Court of Florida to ignore arguably overbroad aggravating circumstances considered by the sentencer, *but only where those circumstances could not possibly have affected the outcome of the sentencing determination because a finding of no mitigation had been made and properly reviewed on appeal.*

Later cases have consistently adhered to *Eddings*'s requirement that a state appellate court must give individualized consideration to the particular sentencing record under review if it undertakes to affirm a death sentence despite trial court error relating to aggravating circumstances. The cases have arisen in a variety of settings, some involving constitutional error and some involving only state-law error in the trial court. Every case, however, has insisted that a state court's decision to affirm must reflect some individualized consideration of the effect of the error in the light of the relevant facts of record bearing upon sentence. "What is important," the Court has reiterated, "is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879 (1983) (emphasis in original); *Barclay v. Florida*, 463 U.S. 939, 958 (1983).

In *Barclay*, the Court considered an aggravating circumstance, invalid under Florida law, in the context of a statute which operates similarly to the Mississippi statute in that it calls for the "weighing" of particular aggravating circumstances against the mitigating circumstances. 463 U.S. at 954; *Clemons*, 494 U.S. at ——, 110 S.Ct. at 1446 (Florida and Mississippi statutes, unlike Georgia scheme examined in *Zant*, require jury to weigh specific aggravating circumstances that it has found against mitigating circumstances to determine whether death sentence is appropriate). The Court noted "the question whether [the defendant's] sentence must be vacated depends on the function of the finding of aggravating circumstances under Florida law and on the reason why this aggravating circumstance is invalid." *Barclay*, 463 U.S. at 951; *see also Zant*, 462 U.S. at 864.

The issue in *Barclay* thus was defined as whether the "trial judge's consideration of [an aggravating circumstance invalid under the state law but valid under the federal Constitution] so infects the balancing process created by the Florida statute that it is constitutionally impermissible for the Florida Supreme Court to let the sentence stand." 463 U.S. at 956.[22] The Court held, consistent with *Eddings v. Oklahoma*, that:

> There is no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the balance. See n.9, *supra*. "What is important . . . is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Zant, supra*, at 879 (emphasis in original).

Barclay, 463 U.S. at 958.

The approach taken by this Court in *Barclay*, even as it is applied to improper aggravating circumstances under *State law*, is incompatible with a procedure of "automatic affirmance." No appellate court could determine whether the "improper aggravating circumstance so infects the balancing process created by the Florida statute that it is constitutionally impermissible to let the sentence stand" without some determination of the quality of the factors being balanced. *Cf. Clemons*, 494 U.S. at ——, 110 S.Ct. at 1448 ("It is a routine task of appellate courts to decide whether the evidence supports a

---

[22] Because the Court found no constitutional error in the aggravating circumstances considered by the sentencer, the Court saw no need to apply the type of the "federal harmless-error analysis" which was necessary in *Zant*. *Barclay*, 463 U.S. at 951, n.8.

jury verdict and in capital cases in 'weighing' States, to consider whether the evidence is such that the sentencer could have arrived at the death sentence that was imposed"). Mindful of that fact, the *Barclay* Court required "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime," and in this regard found that "the Florida Supreme Court does not apply its harmless-error analysis in an automatic or mechanical fashion, but rather upholds death sentences on the basis of this analysis only when it actually finds that the error is harmless." *Barclay*, 463 U.S. at 958, (*citing Zant* at 879 (emphasis in original)).

In *Wainwright v. Goode*, 464 U.S. 78 (1983) (per curiam), the Court endorsed an alternative "cure" by a state appellate court for sentencing phase error. The trial judge's findings of two mitigating circumstances prevented the state appellate court from concluding that the sentencer's reliance on an improper aggravating circumstance was harmless as in *Barclay*. *Id.* at 80. The sentence could stand, however, because the state appellate court "independent[ly] reweigh[ed] . . . the aggravating and mitigating circumstances" without including the invalid aggravating circumstance in the balance. *Id.* at 86-87.

Thus, *Barclay* and *Goode* left no room for an appellate court in a "weighing" state like Mississippi to "automatically affirm" a death sentence imposed in reliance upon an unconstitutional aggravating circumstance. A rule of "automatic affirmance" is the antithesis of an "*individualized* determination" that "the elimination of the improperly considered aggravating circumstances could not possibly affect the balance," *Barclay*, 463 U.S. at 958, or an "independent reweighing of the aggravating and mitigating circumstances." *Goode*, 464 U.S. at 87.

The inescapable conclusion from analysis of *Lockett*, *Eddings*, *Barclay* and *Goode* is that the Eighth Amend-

ment principle upon which James Stringer relies—i.e., the necessity of individualized review by state appellate courts to cure constitutional error in the sentencing phase of capital cases—was the established law long before Stringer's conviction was final in 1985. *Clemons* states that a state appellate court may reweigh aggravating and mitigating circumstances to cure constitutional error at the trial court level. But the opinion in no way alters the established law that such a cure must be employed in an individualized fashion.

Because aggravating circumstances played no role in "determining" punishment under the Georgia sentencing scheme, *Zant v. Stephens*, did not influence the Court's decision in *Clemons*. *See Clemons*, 494 U.S. at ——, 110 S.Ct. at 1446. In *Zant*, decided before *Barclay* and *Goode*, the Court sought to determine whether the presence of an unconstitutionally vague statutory aggravating circumstance "may have affected the jury's deliberations." [23] *Zant*, 462 U.S. at 885. Because "the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty" in Georgia, the " 'mere fact that some of the aggravating circumstances presented were improperly designated 'statutory' had 'an inconsequential impact on the jury's decision regarding the death penalty." *Id.* at 874, 889; *see also*, *id.* at 894 (Rehnquist, J., concurring in the judgment). Thus the dispositive fact in *Zant* was that "in Georgia, unlike some states, the jury is not instructed to give any special weight to any aggravating circumstance, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance

---

[23] The Court first determined that the limited role of aggravating circumstances in Georgia's statutory scheme was constitutionally valid, and that an unconstitutional aggravating circumstance would not necessarily require vacating the death sentence pursuant to *Stromberg v. California*, 283 U.S. 359 (1931).

aggravating circumstances against mitigating circumstances pursuant to any special standard." *Id.* at 873-74.[24] The Court explicitly held that its decision in *Zant* had no application to a state sentencing scheme where the sentencer was required to weigh aggravating and mitigating circumstances. *Id.* at 873-74, n.12, 890.

The *Zant* opinion reemphasized the constitutional requirement of "individualized determination and appellate review at the selection stage" and noted that the decision "depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness . . . ." *Id.* at 879, 890. Nothing in the opinion gave state appellate courts permission to affirm, without individualized review, a death sentence imposed by a sentencer that relied on an unconstitutional aggravating factor. On the contrary, state appellate courts were charged with determining, as this Court itself did in *Zant*, whether the invalid aggravating circumstance "may have affected the jury's deliberations." *Id.* at 885. That determination requires "careful scrutiny" because of the "severity of the sentence." *Id.* As such, *Zant* could not possibly be said to countenance a rule of "automatic affirmance" in a weighing jurisdiction. "Automatic affirmance" involves no scrutiny whatsoever; by definition, it ignores the actual effect an invalid aggravating circumstance may have had on a jury's ultimate sentencing determination.[25] Therefore, to the extent the

---

[24] States with statutes like Georgia's have since the *Zant* decision relied upon the limited role aggravating circumstances play in their statutory schemes to justify affirming death sentences despite the presence of an invalid or unconstitutional aggravating circumstance. *See, e.g., State v. Plath*, 313 S.E.2d 619, 629 (S.C. 1984); *Flamer v. State*, 490 A.2d 104, 135-136 (Del. 1983); *People v. Coleman*, 129 Ill.2d 321, 135 Ill.Dec. 834, 544 N.E.2d 330, 341 (1983); *State v. LaRette*, 648 S.W.2d 96, 102 (Mo. 1983).

[25] Even in a non-weighing jurisdiction, like Georgia, *some* case-specific individualized scrutiny is required where an invalid aggravating circumstance has been employed. In *Zant*, this Court accepted the Georgia Supreme Court's "view that the subsequent invalidation of one of several aggravating circumstances does not automatically require reversal of the death penalty, *having been assured that a death sentence will be set aside if the invalidation of an aggravating circumstance makes the penalty arbitrary or capricious.*" *Zant v. Stephens*, 462 U.S. at 890 (emphasis added).

Fifth Circuit and the Mississippi Supreme Court relied on *Zant* as a justification for a rule of "automatic affirmance," [26] they did so in spite of and not because of the language of the Court's decision in *Zant*.

C. At the Time Petitioner's Conviction Was Final, State Courts in "Weighing" Jurisdictions Understood the Constitutional Requirement to Consider the Effect of an Unconstitutional Aggravating Circumstance on the Sentencer's Death Verdict

Given the strength and breadth of the precedent requiring individualized review of trial court error by a state supreme court in a "weighing" jurisdiction, the State of Mississippi declined to argue in *Clemons v. Mississippi* that a rule of "automatic affirmance," applied by the Mississippi Supreme Court in *Clemons* was sufficient to salvage the death sentence. Instead, Mississippi relied on *Zant*, *Barclay*, *Goode*, and *Satterwhite v. Texas*, 486 U.S. 249 (1988), to support its argument that a harmless error or reweighing analysis does not offend the Constitution. Mississippi's Attorney General argued that a majority of the states addressing the issue allow "a reweighing or harmless error analysis to be conducted in such situations," in lieu of automatic reversal. When asked during oral argument whether a procedure of "automatic affirmance" would cure constitutional error if applied in Mississippi, the Attorney for Mississippi agreed it would not.[27]

---

[26] *See, e.g., Stringer v. Jackson*, 862 F.2d 1108, 1113-15 (5th Cir. 1988); *Irving v. State*, 498 So.2d 305, 314 (Miss. 1986).

[27] QUESTION: "And, if the Mississippi court does not meet the *Chapman* standard, or if we disagree with the harmless error analysis, then the case has to be reversed, correct?"

[Continued]

Under *Teague* and *Penry*, one important indicator is what view a state court would have taken of a claim based on this kind of rule at the time James Stringer's conviction became final on February 19, 1985. *See Penry*, 492 U.S. at 313; *Teague*, 489 U.S. at 301. *Teague* prescribes non-retroactivity for constitutional rules that "break new ground or impose a new obligation on the States or the Federal Government" or that announce a result that "was not dictated by precedent." *Penry*, 492 U.S. at 314 (quoting *Teague*, 489 U.S. at 301, with emphasis in original). Conversely, retroactive application of Eighth Amendment rights is appropriate when it would serve "as a necessary incentive for trial and appellate judges throughout the land to conduct their proceedings in a manner consistent with established constitutional standards." *Teague*, 489 U.S. at 306 (*quoting Desist v. U.S.*, 394 U.S. 244, 262-263 (1969) (Harlan, J., dissenting)). As *Penry* reveals, the retroactivity inquiry should

---

[27] [Continued]

MR. WHITE: "Unless—unless there is the reweighing. I mean, that—"

QUESTION: "Well, you just conceded that a plausible way to read the opinion is to say there is no reweighing, that it is just harmless error. And I say if you are wrong on harmless error, then it has to be reversed. Right?"

MR. WHITE: "Well, I would have to agree with you there, I guess, in that situation. . . ."

QUESTION: "Mississippi's—under the statute, Mississippi is a weighing state. You weigh aggravating against mitigating."

MR. WHITE: "That is right."

QUESTION: "And unless somebody does the weighing, they aren't following the statute. And if the Mississippi court is saying this is just a rule of law, we don't have—if we invalidate two of three aggravating circumstances, but nevertheless affirm, without going through a weighing process or even saying the aggravating circumstances nevertheless outweighs the mitigating, they are then seemingly disregarding their own statute that is still the law in Mississippi."

MR. WHITE: "That would be correct there. . . ."

Clemons v. Mississippi, Case No. 88-6873, Official Transcript Proceedings Before the Supreme Court of the United States pp. 25, 29.

be focused on the expectations generated by previously established decisions concerning the actions to be taken by state courts, who were charged with the duty of applying Eighth Amendment precedent conscientiously to the evolving problems that came before them. *See Penry*, 492 U.S. at 315-319.

Of all the states which purport to limit capital sentencers to a "weighing" of a limited set of specified aggravating factors against mitigating factors to determine sentence, only Mississippi took the view that a death sentence should be affirmed notwithstanding the sentencer's use of an unconstitutionally vague aggravating circumstance merely because another valid aggravating circumstance was found—i.e., without any regard whatsoever for the mitigating circumstances in the case.

Before *Clemons*, most "weighing" states held that the Eighth Amendment forbids such unindividualized treatment in a capital case, pointing to *Furman*, *Proffitt*, *Barclay*, *Goode* and *Zant*. *See, e.g., Baldwin v. State*, 456 So.2d 117, 125-28 (Ala.Crim.App. 1983) (applying harmless error test mandated by *Barclay*); *People v. Brown*, 758 P.2d 1135, 1144-45 (Cal. 1988) (relying on *Woodson v. North Carolina*, *Satterwhite v. Texas*, and *Zant v. Stephens* for the proposition that the constitution requires a stricter harmless error test for constitutional error in capital sentencing determinations than the one that court normally applied to errors of state law); *Elledge v. State*, 346 So.2d 998, 1003 (Fla. 1977) (*Furman* dictates reversal "when we do not know whether the result of the weighing process would have been different had the impermissible aggravating circumstance not been present"); *State v. Henderson*, 789 P.2d 603, 609-11 (N.M. 1990) (*Barclay* requires reversal where the court is unable to determine the impact of an invalid aggravating circumstance on the death sentence because no express findings regarding mitigating circumstances were made at the trial level); *State v. Davis*, 528 N.E.2d 925, 931-36 (Ohio 1988) (applying harmless error test mandated by *Bar-*

clay); *Stouffer v. State*, 742 P.2d 562, 564-65 (Okla. Crim.App. 1987 (same); *Commonwealth v. Holcomb*, 498 A.2d 833, 864-65 (Pa. 1985) (Larsen, J., dissenting) (urging adoption of the *Barclay* harmless error test in lieu of automatic reversal rule adopted by majority); *State v. Hines*, 758 S.W.2d 515, 524 (Tenn. 1988) (applying *Chapman v. California* harmless error test); *Hopkinson v. State*, 632 P.2d 79, 171-72 (Wyo. 1981) (*Furman* dictates reversal "when we do not know whether the result of the weighing process would have been different had the impermissible aggravating circumstances not been present"); *see also*, *Lindsey v. Thigpen*, 875 F.2d 1509, 1515 (11th Cir. 1989) (Where the trial court found four aggravating factors and no mitigating factors, consideration of the "especially heinous, atrocious or cruel" aggravating circumstance was harmless under the reasoning of *Barclay*); *Coleman v. Saffle*, 869 F.2d 1377, 1387-90 (10th Cir. 1989) (*Barclay* and *Zant* allow application of an individualized harmless error review; where four valid aggravating circumstances and no mitigating circumstances, error harmless beyond a reasonable doubt).

Other "weighing" states also rejected an automatic affirmance approach before *Clemons*, although without explicit reliance on the Eighth Amendment. *See, e.g.*, *Williams v. State*. 274 Ark. 9, 10, 621 S.W.2d, 686, 687 (1981); *Thompson v. State*, 492 N.E.2d 264 (Ind. 1986); *State v. Peery*, 199 Neb. 656, 657-58, 261 N.W.2d 95, 96 (1977); *State v. Irwin*, 304 N.C. 93, 107, 281 S.E.2d 439, 449 (1981); *State v. Carter*, 776 P.2d 886, 896 (Utah 1989). The remaining "weighing" states never addressed the issue prior to this Court's decision in *Clemons*.

Moreover, states with Georgia-like capital statutes have relied upon the limited function that aggravating circumstances serve under their statutory schemes to uphold sentences of death notwithstanding sentencer consideration of an invalid aggravating circumstance. *See, e.g.*, *Flamer v. State*, 490 A.2d 104, 135-36 (Del. 1983) (Delaware's statute is similar to Georgia's statute as described

in *Zant* and unlike Florida scheme in *Barclay*; trial court's instructions did not place particular emphasis on the role of statutory aggravating circumstances or suggest that the presence of more than one aggravating circumstance should be given special weight); *People v. Coleman*, 129 Ill.2d 321, 343-345, 135 Ill.Dec. 834, 544 N.E.2d 330, 342 (1989) (Like Georgia, Illinois does not place special emphasis on any aggravating factor and does not accord any added significance to multiple aggravating circumstances as opposed to a single such circumstance); *State v. LaRette*, 648 S.W.2d 96, 102 (Mo. 1983) (having found the threshold requirements of statutory aggravating circumstances, the jury could consider all the evidence adduced at trial in imposing the death sentence); *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619, 629 (1984) (additional aggravating circumstances do not contribute to the actual selection of the death penalty because juries are not instructed to "weigh" aggravating against mitigating circumstances); *see also*, *Briley v. Bass*, 742 F.2d 155, 166 (4th Cir. 1984) (Virginia, like Georgia, does not require the jury to "give any special weight to any particular aggravating circumstances, to consider multiple aggravating circumstances more significant than one aggravating circumstance or to balance aggravating circumstances against mitigating circumstances under a special standard").

The lower courts understood, therefore, that some type of individualized review was required by the constitution to cure errors in instructions on aggravating circumstances, where each aggravating circumstance found to exist by the sentencer played a role in determining punishment. Mississippi appears to have stood alone among "weighing" jurisdictions in applying a rule which permits constitutional error to stand unrectified without regard to the impact of the error upon the actual mix of aggravating and mitigating circumstances in the case.

Mississippi's choice was not the product of a reasoned decision. Originally, prior to *Zant v. Stephens*, the Mis-

sissippi Supreme Court explicitly adopted the Florida Superme Court's approach to review erroneous aggravating circumstances. *See, e.g., Gilliard v. State*, 428 So.2d 576, 586 (Miss. 1983) (upholding the death sentence despite presence of arguably unconstitutional aggravating circumstance by relying on Florida Supreme Court's decision in *Dobbert v. Florida*, 375 So.2d 1069 (Fla. 1979); "[t]he only distinction between *Dobbert* and the present case is that in *Dobbert*, under Florida law, the judge determined the sentence without a jury"); *Evans v. State*, 422 So.2d 737, 741-742 (Miss. 1982) (Despite the presence of arguably invalid aggravating circumstances, "there were other aggravating circumstances in the present case, and, under the Florida decisions, they were sufficient to sustain the conviction"). That is, the Court purported to apply an individualized harmless error rule like the Florida approach examined in *Barclay*. *See* 463 U.S. at 958 (1983) ("the Florida Supreme Court does not apply its harmless-error analysis in an automatic or mechanical fashion, but rather upholds death sentences on the basis of this analysis only when it actually finds that the error is harmless").

The Mississippi Supreme Court gradually shifted, without acknowledging a change, to a rule of "automatic affirmance." In no case has the Mississippi court undertaken to square the change with the rule of individualized treatment acknowledged by this Court's decisions long before *Clemons* in *Eddings*, *Zant*, *Barclay* and *Goode*. Nevertheless, as a result of this unexamined change, deferred to by the United States Court of Appeals for the Fifth Circuit, no court has determined whether the constitutionally invalid aggravating circumstance presented to James Stringer's jury may have contributed to the jury's death verdict. That failure was inconsistent with the settled law of the Eighth Amendment in 1985, as well as five years later, when *Clemons* was decided.

CONCLUSION

For all the foregoing reasons, the judgment below should be reversed and petitioner's case should be remanded with instructions to grant the writ of habeas corpus, permitting the Mississippi courts to conduct resentencing within a reasonable time.

Respectfully submitted,

KENNETH J. ROSE *
923 Carolina Ave.
Durham, N.C. 27705
(919) 286-7653

JAMES W. CRAIG
123 E. Griffith St.
Jackson, Miss. 39201
(601) 352-0784

LOUIS D. BILIONIS
School of Law
University of North Carolina
Chapel Hill, N.C. 27599-3380
(919) 962-7219

* Counsel of Record

Counsel for Petitioner

RESPONDENT'S

BRIEF

(8)

NO. 90-6616

In The Supreme Court of the United States

October Term, 1991

JAMES R. STRINGER,
PETITIONER

VERSUS

LEE ROY BLACK, COMMISSIONER,
MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL.
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS

MIKE MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
COUNSEL OF RECORD

CHARLENE R. PIERCE
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205
TELEPHONE: (601) 359-3680

COUNSEL FOR RESPONDENTS

QUESTION PRESENTED

Were Clemons v. Mississippi and Maynard v. Cartwright dictated by precedent, such that they cannot be considered "new rules" under Teague v. Lane?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

AMENDMENTS, STATUTES AND RULES **PAGE**

NO. 90-66616

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

JAMES R. STRINGER,
Petitioner

versus

LEE ROY BLACK,
Commissioner,et al.
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS

This matter is before the Court on the Petition of James R. Stringer for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit wherein the Court affirmed the denial of habeas corpus relief as to his conviction for capital murder and sentence of death.

OPINION BELOW

The opinion of the Court of Appeals denying habeas review is reported as

Stringer v. Jackson, 909 F.2d 111 (5th Cir. 1990). The opinion is reprinted at JA 68-69.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under the authority of 28 U.S.C. §1254(1) challenging the constitutionality of his sentence.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has adequately identified the pertinent constitutional provisions involved and set them forth in the Brief of Petitioner.

STATEMENT OF THE CASE

A. Substantive Facts:

The conviction and sentence of death arise out of the June 21, 1982, armed robbery and murder of Ray McWilliams and his wife Nell in their home. Petitioner, his son and several others went to the

McWilliams' home to rob them of a large amount of cash and jewels supposedly kept there in a safe. The brutal facts of this crime are graphically and sufficiently set forth in the opinion of the Mississippi Supreme Court, and we would adopt them as our statement of facts here. Stringer v. State, 454 So.2d 468, 471-473 (Miss. 1984).

B. Procedural History:

Petitioner was indicted for capital murder by the grand jury of the Circuit Court of Hinds County, Mississippi, First Judicial District, during the July 1982 Term of said court. Petitioner's trial was conducted during the September 1982 Term of said court before a properly empaneled jury. After hearing the evidence and being fully instructed as to the law, the jury returned a verdict of guilty of capital murder. The trial then proceeded to the issue of sentence. At

the conclusion of the sentencing phase of the trial the jury returned a sentence of death in proper form, finding that the following aggravating circumstances existed:

> We the jury, unanimously find that the aggravating circumstances of:
>
> 1. The Defendant contemplated that life would be taken and/or the capital murder was intentionally committed and that the Defendant was engaged in an attempt to commit a robbery; and was committed for pecuniary gain.
>
> 2. The capital murder was committed for the purpose of avoiding or preventing the detection and lawful arrest of James R. Stringer, the Defendant.
>
> 3. The capital murder was especially heinous, atrocious or cruel.
>
> Tr. 1435.

After trial, but prior to the perfection of the direct appeal in this case, a petition for writ of error coram nobis was filed in the Circuit Court.

After an evidentiary hearing was conducted on this petition, it was denied. An appeal was taken to the Mississippi Supreme Court challenging the conviction of capital murder and the death sentence and the denial of the petition for writ of error coram nobis. On his automatic appeal to the state supreme court petitioner raised the following claims:

> On direct appeal:
>
> 1. The Court erred in allowing the District Attorney to cross examine the appellant about his unwillingness to submit to a lie detector test, over the objection of counsel and in admitting into evidence an agreement between the district attorney's office and the witnesses, Brock and Medders to have their version of the events corroborated by a lie detector test, this admission into evidence although not objected to at the time is plain error under the rules of this Court.
>
> 2. It was highly improper and prejudicial for the Trial Court to permit the state to question the defense witnesses, Tammy Williams, and the defendant, James Stringer, about

what drugs they had used or were using and to allow into evidence against the defendant a weapon concealed in his boot at the time of his arrest which bore no relation to the crime.

3. Appellant was deprived of effective assistance of counsel.

4. The Court erred in allowing the District Attorney to ask and elicit an answer from the defense witness, Tammy Williams, that she had been "charged" with conspiracy to commit murder and accessory after the fact.

5. The appellant respectfully submits that this case should be reversed if for no other reason that on the basis of the entire record, taking all errors and prejudicial matter into consideration, the defendant was deprived of a fair trial.

On error coram nobis appeal:

1. The court erred in allowing the witness Walter Owens, III to invoke the Fifth Amendment.

2. The court erred in not allowing defense counsel to amend his petition to include the destruction of the tape.

Stringer v. State, 454 So.2d at 479, 480.

These two appeals were consolidated and heard together. On July 11, 1984, the Mississippi Supreme Court unanimously affirmed the conviction and sentence of death entered by the Hinds County jury and also affirmed the denial of coram nobis relief. A petition for rehearing was filed, and the original opinion was modified on denial of the petition for rehearing on August 15, 1984. Stringer v. State, 454 So.2d 468 (Miss. 1984). This modification did not disturb the affirmance of the conviction and death sentence.

Stringer then petitioned this Court to grant a petition for writ of certiorari to the Mississippi Supreme Court. This petition stated as its Questions Presented the following claims:

1. Was petitioner denied effective assistance of counsel in violation of the 6th and 14th Amendments?

2. Did cross examination about refusal to take a polygraph test offend the 5th and 14th Amendments?

3. Did refusal to instruct jury during the penalty stage of capital trial that jury could grant mercy even if the aggravating circumstances outweigh mitigating circumstances offend the 8th and 14th Amendments?

4. Were persons who expressed reservations about the death penalty improperly excluded from the jury in violation of the 6th and 14th Amendments?

5. Did the state courts erroneously conclude that the evidenced fully supported the findings of statutory aggravating circumstances in violation of the 8th and 14th Amendments?

Petition for Writ of Certiorari.

The State responded. In due course the petition was denied by this Court on February 19, 1985. Stringer v. Mississippi, 469 U.S. 1230 (1985).

Petitioner then filed a Motion To Vacate Or Set Aside Judgment And Sentence with the Mississippi Supreme Court in

compliance with Miss. Code Ann., §99-39-1, et seq. (Supp. 1990), raising numerous claims. On January 15, 1986, the Mississippi Supreme Court denied post-conviction relief with a written opinion. Stringer v. State, 485 So.2d 274 (Miss. 1986). A petition for rehearing was denied on April 9, 1986.

Petitioner then filed a petition for writ of certiorari from this denial of post-conviction relief claiming:

Was petitioner denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution where his trial attorney refused to present mitigation testimony from family members at the penalty phase of his capital trial because the trial attorney believed such testimony might compromise the defense of petitioner's son, who was also charged with capital murder for the same offense and who was represented by the same trial attorney?

This petition was denied on October 20, 1986 by this Court. Stringer v.

Mississippi, 479 U.S. 922 (1986). The Mississippi Supreme Court then, on motion of the State, reset an execution date for petitioner.

In response, petitioner filed a petition for writ of habeas corpus and a motion for stay of execution with the United States District Court for the Southern District of Mississippi. A stay of execution was entered on January 12, 1987, by the District Court. On November 20, 1987, after conducting an evidentiary hearing, the District Court entered its Memorandum Opinion and Order denying relief on all issues. Stringer v. Scroggy, 675 F.Supp. 356 (S.D. Miss. 1987). A motion to alter or amend under Rule 59(e) was timely filed. This motion was denied with a five page written opinion on January 22, 1988. This opinion is unpublished. Stringer v. Scroggy, Civil Action No. J87-0015(B). Petitioner

filed a notice of appeal and applied for a certificate of probable cause. The district court granted the requested certificate of probable cause.

Petitioner then pursued his appeal to the Court of Appeals for the Fifth Circuit. Briefs were filed, and oral argument was had. On December 22, 1988, the Fifth Circuit issued its opinion affirming the denial of relief by the district court. Stringer v. Jackson, 862 F.2d 1108 (5th Cir. 1988)(Stringer I). A petition for panel rehearing and a suggestion for rehearing en banc were filed. These petitions were denied on January 20, 1989. Petitioner was granted a stay of the mandate in order to file his petition for writ of certiorari with this Court challenging the decision of the court of appeals.

On certiorari to this court from the decision of the Fifth Circuit petitioner

presented three questions. These questions read:

> 1. Whether the Fifth Circuit erred in failing to find that an instruction requiring the jury to unanimously find mitigating circumstances before considering them violates this Court's holding in **Mills v. Maryland**, ___ U.S. ___, 108 S.Ct. 1860 (1988).
>
> 2. Whether a United States Circuit Court of Appeals can automatically uphold a death sentence imposed after consideration of an unconstitutionally vague aggravating circumstance despite a state law requirement that the jury weight the statutory aggravating circumstances against all mitigating circumstances in determining the appropriate sentence.
>
> 3. Whether the Fifth Circuit Court of Appeals erred in holding that the trial court's refusal to grant a life option instruction did not result in a mandatory sentence of death by improperly limiting the jury's discretion.
>
> Petition at i.

On April 16, 1990, this Court issued the following order:

> The motion for leave to proceed in forma pauperis and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of **Clemons v. Mississippi**, 494 U.S. ___ (1990).

Stringer v. Black, ___ U.S. ___, 110 S.Ct. 1800, 108 L.Ed.2d 931 (1990).

On remand to the Fifth Circuit for further consideration, petitioner presented two issues to the court of appeals. He presented the Clemons v. Mississippi, 494 U.S. ___, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), issue and renewed his claim under Mills v. Maryland, 486 U.S. 367 (1988) and McKoy v. North Carolina, 494 U.S. 433 (1990).[1]

---

1 While this case was pending in the Fifth Circuit on this latest reconsideration, the petitioner filed a second and successive state post-conviction petition with the Mississippi Supreme Court raising these same issues. Petitioner requested that the Fifth Circuit stay proceedings while this Court considered the present petition. The Fifth Circuit refused to stay consideration of the

On July 30, 1990, the Fifth Circuit issued its opinion on remand. The Court reinstated its prior affirmance of the denial of habeas relief holding that Clemons represented new law and would not be applied retroactively to petitioner's case. The court of appeals did not address the Mills/McKoy argument on remand. Stringer v. Jackson, 909 F.2d 111 (5th Cir. 1990). The petition for rehearing and suggestion for rehearing en banc were denied on September 10, 1990. The mandate in this case was issued instanter on July 30, 1990. The Court refused to recall this mandate.

Petitioner then filed the present petition for writ of certiorari presenting the five following questions:

---

issues presented on remand while the Mississippi Supreme considered whether it would entertain this second the petition. This successive petition is still pending before the Mississippi Supreme Court.

1. Did the court below disregard this Court's remand instruction to reconsider this case in light of **Clemons v. Mississippi** by applying a state rule of automatic affirmance that this Court found did not clearly exist in **Clemons**?

2. Can a federal court avoid grant relief from an unconstitutional death sentence by invoking a state "harmless error" rule (1) that was not imposed by the state courts, and (2) that is plainly unconstitutional under **Clemons v. Mississippi**, and **Chapman v. California**, 386 U.S. 19 (1967)?

3. Were **Clemons v. Mississippi** and **Maynard v. Cartwright** dictated by precedent, such that they cannot be considered "new rules" under **Teague v. Lane**?

4. Is the requirement of limited sentencing discretion a bedrock procedural element essential to the fairness of a capital sentencing proceeding?

5. Where the State deliberately waives the defense of nonretroactivity in one federal court forum, should it be permitted to raise this defense in the next?

Pet. for Cert. at i.

On May 13, 1991, this Court entered the following order:

> The motion of petitioner for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted limited to Question 3 presented by the petition.

Stringer v. Black, ___ U.S. ___, 111 S.Ct. 2009, 114 L.Ed.2d 97 (1991).

SUMMARY OF THE ARGUMENT

In the case before the Court, there is an opportunity to resolve the confusion and conflict created by the opinion in Lowenfield and the new rules established in Maynard and Clemons when applied to the Mississippi capital sentencing scheme. Contrary to the assertions of petitioner the Mississippi capital sentencing scheme is not comparable with those schemes found in Georgia, Florida, and Oklahoma. Instead, the Mississippi scheme is identical in its function to the scheme found in Louisiana and expressly approved in Lowenfield.

We submit that Maynard and Clemons represent the establishment of two new rules insofar as the Mississippi sentencing scheme is concerned. The holding in Maynard was contrary to established precedent of this Court in Lowenfield and the Court of Appeals for the Fifth Circuit as applied to the "especially heinous" aggravating factor under Mississippi's scheme. To the extent that Clemons represents an extension of Maynard it is also a new rule when applied to the case at bar, as both were decided after the direct appeal became final in this cause.

The opinion in Clemons also finds this Court, for the first time, limiting the manner in which the Mississippi court must treat the presence of an invalid aggravating circumstance when other valid circumstances remain. Long established reliance by the Mississippi court and the Federal courts in the Fifth Circuit on

Zant was obliterated with the opinion in Clemons. Thus, Clemons established a new rule limiting the process of consideration of invalid circumstances under the Mississippi scheme.

In addition, Clemons constitutionalizes the application of aggravating circumstances in a scheme that does not use those circumstances to narrow the class of death eligible defendants. This holding in Clemons is contrary to the holding of this Court in Lowenfield.

Therefore, the Court created a new rule barring the application of that part of Clemons and Maynard to cases pending on federal collateral review.

ARGUMENT

I. The Mississippi Capital Sentencing Scheme.

The Court is presented with the question of whether Maynard v. Cartwright, 486 U.S. 356 (1988), and Clemons v. Mississippi, 494 U.S. ___, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), are new law under the rationale of Teague v. Lane, 489 U.S. 288 (1989), and its progeny[2] so as to bar their retroactive application to cases pending on applications for federal post-conviction relief.

To fully understand that both Maynard and Clemons represent new rules when applied to the Mississippi death penalty scheme, the Court must focus on the function of the "especially heinous"

---

2 Penry v. Lynaugh, 492 U.S. 302 (1989); Butler v. McKeller, 494 U.S. ___, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990); Saffle v. Parks, 494 U.S. ___, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990); Sawyer v. Smith, 497 U.S. ___, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990).

aggravating factor under the Mississippi scheme rather than the magic words "especially heinous, atrocious or cruel" themselves. In his brief Petitioner equates the use of this factor in Mississippi with its function under the Georgia statute. This ignores the fundamental differences in the two schemes.

In Mississippi, as opposed to Georgia, and for that matter, Florida and Oklahoma, the crime of capital murder is narrowly defined just as it is in Texas and Louisiana. In Miss. Code Ann., §99-3-19(2) (Supp. 1990), the crime of capital murder is narrowly limited to seven specific crimes.[3] These crimes are not

---

[3] The crimes which can carry the death sentence in Mississippi are limited to (1) the murder of a peace officer; (2) murder by a person under sentence of life imprisonment; (3) murder by the use of a bomb or explosive devise; (4) murder for hire or contract murder; (5) a killing in the course of a rape, burglary, kidnapping, arson, robbery, sexual batter,

the aggravating factors used in the sentencing phase of a capital murder trial, but the statutory definition of capital murder. In Mississippi no person is eligible for the death penalty unless he commits one of the crimes enumerated in the statute and is found guilty of that crime at the guilt phase of the trial. The constitutionally required "narrowing" function of the jury thus takes place during the guilt phase of a Mississippi capital murder trial. Only after a defendant is convicted of one of the narrowly defined offenses does he become eligible for consideration for imposition of the death penalty.

In the case at bar Stringer was indicted for and convicted of killing Ray

---

unnatural intercourse with any child under the age of twelve, or nonconsensual unnatural intercourse with mankind, or the attempt to commit such felonies; (6) the killing of a child during the felonious abuse of a child; (7) murder of an elected official.

McWilliams during the course of a robbery in the guilt phase of his trial. A killing in course of a robbery is one of the crimes statutorily defined as capital murder. See, Miss. Code Ann., §99-3-19(2)(e), (Supp. 1990). Thus, according to Mississippi law and the precedent of this Court, the constitutionally required narrowing function was fulfilled at this point.

After conviction of the specifically defined capital crime, the trial moves into the second or sentencing phase. In order to return a sentence of death during this second phase of the trial, the jury must additionally find, beyond a reasonable doubt, at least one of the eight (8) aggravating circumstances found in Miss. Code Ann., §99-19-101(5) (Supp. 1990).[4]

---

[4] The aggravating factors under this statute are: that the capital offense was committed (a) by a person under sentence of imprisonment, (b) by a defendant who was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person, (c) by a defendant who knowingly created a great risk of death to many persons, (d) while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy, sexual battery, unnatural intercourse with any child under the age of twelve, or noncon-sensual unnatural intercourse with mankind or felonious abuse and/or battery of a child, or the unlawful use or detonation of a bomb or explosive device, (e) for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody, (f) for pecuniary gain, (g) to disrupt or hinder the lawful exercise of any governmental function or the enforcement laws, and (h) the capital offense was especially heinous, atrocious or cruel.

If the jury finds an aggravating factor then it must consider whether any mitigating circumstances exist.[5] The jury then weighs any aggravating circumstances found

---

[5] The statutory mitigating circumstances are found in Miss. Code Ann., §99-19-101(6), (Supp. 1990). However, under Mississippi precedent, mitigating factors are not limited to those contained in the statute. Further, there is no burden of proof that must be met by a defendant prior to the jury's consideration of whatever the jury considers mitigating.

against the mitigating factors, if any. If the mitigating circumstances do not outweigh the aggravating circumstances the jury may, but is not required to, return a sentence of death.

In contrast, Georgia, Florida and Oklahoma, allow any person convicted of first degree murder to becomes eligible for a death sentence upon the jury's finding of one of the aggravating circumstances enumerated in their statutes during the sentence phase. In these states, it is the finding of an aggravating circumstance during the sentencing phase of the trial that is the constitutionally required narrowing agent in those schemes.

The scheme found in Mississippi was approved by this Court in Lowenfield v. Phelps, 484 U.S. 231 (1988). There this Court held:

> Here, the "narrowing function" was performed by the

> jury at the guilt phase when it found defendant guilty of three counts of murder under the provision that "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person." The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm. There is no question but that the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more. [Emphasis added.]

484 U.S. at 246.

As can be seen, the Mississippi and Louisiana schemes are indistinguishable in their narrowing function. Thus, the aggravating circumstances found in the sentencing phase of a Mississippi death penalty trial are "no part of the con-

stitutionally required narrowing process." Lowenfield.

If the aggravating circumstances are not part of the constitutionally required narrowing function, what are they? Respondents submit that they simply serve as a state law device to further channel the jury's discretion.

We would emphasize that no defendant in Mississippi could ever receive the death sentence under the circumstances found in Godfrey v. Georgia, 446 U.S. 420 (1980). Under the Georgia scheme, Godfrey was convicted of first degree murder. This did not make him eligible for the death penalty. Only upon the finding of the "outrageously wanton, vile, horrible or inhuman" aggravating factor during the sentencing phase did he become eligible for the imposition of the death sentence.

Under Mississippi law, the defendant would first have to commit and be con-

victed of one of the statutorily defined capital murders. Looking to the statute we find an "especially heinous" murder is not one of those crimes defined in the statute as capital murder. Not until conviction of one of the narrowly defined crimes do the statutory aggravating circumstances come into play as set out above. Therefore, no one can be sentenced to death in Mississippi simply by the jury finding that he committed an "especially heinous" murder as occurred in Godfrey.

In the case at bar, the jury, after convicting Stringer of a killing during the course of a robbery, moved on to the sentence determination phase of the trial. The jury found the following aggravating circumstances beyond a reasonable doubt:

> 1. The Defendant contemplated that life would be taken and/or the capital murder was intentionally committed and that the Defendant was engaged in an attempt to commit a robbery; and was committed for pecuniary gain.

> 2. The capital murder was committed for the purpose of avoiding or preventing the detection and lawful arrest of James R. Stringer, the Defendant.
>
> 3. The capital murder was especially heinous, atrocious or cruel.
>
> Jury Verdict, JA at 17.

The jury then considered the mitigating circumstances presented in the case to determine if any existed. They weighed the aggravating circumstances against the mitigating circumstances and found the that the aggravating circumstances outweighed the mitigating circumstances.[6] Finally, as required by the instructions,

---

[6] The statute in Mississippi requires that the jury find that the mitigating circumstances outweigh the aggravating before death can be imposed. However, the reversal of this wording in an instruction, as is the case here, to read that the aggravating circumstances must outweigh the mitigating circumstances has never been held to be error by the Mississippi Supreme Court.

the jury made the additional determination that Stringer should suffer death.

From the discussion above, it is obvious that the Mississippi scheme provides the constitutionally required narrowing during the guilt phase. The separate sentence determination process, in which aggravating factors are found, is not part of the constitutionally required narrowing function. The narrowing during the guilt phase and the consideration of aggravating factors in the sentence phase remove the Mississippi scheme from the category of weighing states like Florida and Oklahoma. See, Lowenfield. Two factors lead to this result. First, only certain murders are defined as capital murder. Second, aggravating circumstances are only found after conviction of one of the narrowly defined murder. The fact that the weighing process occurs after the constitutionally required narrowing takes

place decreases its importance in the determination of the sentence. In fact it takes it out of the realm of a weighing statute. See, Flamer v. State, 490 A.2d 104, 134-136 (Del. 1984), cert. denied, 474 U.S. 856 (1985).

A third factor cannot be ignored. After the weighing process takes place, the jury does not automatically sentence the defendant to death. There is another step in the process. At this point the jury must determine whether or not the death penalty should be imposed independent of the weighing process. Even if the jury finds that the aggravating circumstances outweigh the mitigating factors it is not required to sentence a defendant to death. The jury must make an independent determination that the defendant should be sentenced to death. See, Jury Instruction 18, JA at 12; Sentencing Verdict, JA at 18.

Given the clearly outlined differences between the Mississippi scheme and those in Georgia, Florida and Oklahoma, we again ask why the Mississippi scheme, so identical in its narrowing operation, has been treated differently from that found in Louisiana. We submit that Clemons, to the extent that it gives constitutional significance to the aggravating circumstances found under the Mississippi scheme is incorrectly decided.

II. Retroactive Application Or Not?

In order for the bar of non-retroactivity to be applied to a certain case, that case must have been final on direct appeal at the time the case containing the new rule was decided. This Court has stated that "final" on direct appeal means that certiorari has been denied on direct review or the time for filing certiorari from direct review has expired. Linkletter v. Walker, 381 U.S. 618, 622, n. 5

(1965). Stringer's case was final on direct appeal on February 18, 1985, when certiorari was denied by this Court. Stringer v. Mississippi, 469 U.S. 1230 (1985). Maynard was decided on June 6, 1988, and Clemons was decided on March 28, 1990, both well after the decision in Stringer v. State was final. There can be no question that the case at bar meets the first criteria for falling under Teague's bar to retroactive application of a new rule.

The next criteria that must be met, the primary focus of the present inquiry, is whether or not the rules announced in Maynard and Clemons are new rules within the meaning of Teague. In Saffle v. Parks, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990), the Court stated:

> The explicit overruling of an earlier holding no doubt creates a new rule; it is more difficult, however to determine whether we announce a new rule

> when a decision extends the reasoning of our prior cases.
>
> 108 L.Ed.2d at 424.

A new rule is defined by this Court as those rules that were not "dictated by precedent existing at the time the defendant's conviction became final." Teague, supra. at 301 [Emphasis the Court's.] This definition was expounded upon in Butler v. McKellar, 494 U.S. 407, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990), where the Court held:

> But the fact that a court says that its decision is within the "logical compass" of an earlier decision, or indeed that it is "controlled" by a prior decision, is not conclusive for purposes of deciding whether the current decision is a "new rule" under **Teague**. Courts frequently view their decisions as being "controlled" or "governed" by prior opinions even when aware of reasonable contrary conclusions reached by other courts. In **Roberson**, for instance, the Court found **Edwards** controlling but acknowledged a significant difference of opinion on the part of several lower courts that had considered the question

previously. 486 U.S., at 679, n 3, 100 L.Ed.2d 704, 108 S.Ct. 2093. That the outcome in **Roberson** was susceptible to debate among reasonable minds is evidenced further by the differing positions taken by the judges of the Courts of Appeals for the Fourth and Seventh Circuits noted previously. It would not have an illogical or even a grudging application of **Edwards** to decide that it did not extend to the facts of **Roberson**. We hold, therefore, that **Roberson** announced a "new rule."

108 L.Ed.2d at 356-357.

With these basic tenets in mind we would submit that both Maynard and Clemons announced two separate and distinct new rules in so far as the Mississippi death penalty scheme is concerned.

A. Maynard/Godfrey.

Without question this Court stated in Maynard, that "Godfrey controls this case." 486 U.S. at 363. However, under this Court's decisions that does not end the inquiry. The question then becomes whether the decisions in Maynard and

Godfrey applied to the Mississippi capital sentencing scheme were susceptible to debate among reasonable minds. We submit that they were, as evidenced by the Fifth Circuit's opinions in Johnson v. Thigpen, 806 F.2d 1243 (5th Cir. 1986), cert. denied, 480 U.S. 951 (1987), and Evans v. Thigpen, 809 F.2d 239 (5th Cir. 1987), cert. denied, 483 U.S. 1033, reh. denied, 483 U.S. 1036 (1987).

In Johnson v. Thigpen, the court below held that the principles of Godfrey which underpin Maynard, do not apply to the Mississippi death sentencing scheme. Chief Judge Clark's opinion reads:

> The structural differences between the Mississippi statute and the Georgia statute distinguish **Godfrey** from this case. Georgia does not narrow the class of persons eligible for the death penalty by defining specific classes of murders that are capital murder. **Gregg**, 428 U.S. at 196, 96 S.Ct. at 2936. Rather, the aggravating circumstances are the sole statutory narrowing mechanism. id. at 196-97, 96 S.Ct. at 2936.

Thus, in **Godfrey** when the Georgia Supreme Court did not properly limit the "outrageously or wantonly vile" aggravating circumstance, there was indeed "no principled way to distinguish [Godfrey's] case, in which the death penalty was imposed, from the many cases in which it was not." 446 U.S. at 433, 100 S.Ct. at 1767. The Georgia court had failed to make the only statutory factor present in **Godfrey** a narrowing one. For that reason the broad construction of the aggravating circumstance by the Georgia Supreme Court resulted in the death sentence being unconstitutional.

No such failure exists in the present case. Even given Mississippi's broadened construction of the especially heinous aggravating circumstance, and ignoring the other aggravating circumstance found by the jury, the Mississippi capital murder statute still narrows the class of persons eligible for the death penalty. In the present case, for example, Johnson was convicted of the murder of a peace officer acting in his official capacity. This element of a capital offense in Mississippi is a statutory aggravating circumstance in Georgia. Ga. Code § 27-2534.1(b)(8), quoted in **Godfrey**, 446 U.S. at 423 n.2, 100 S.Ct. at 1762 n.2. The definition of capital murder in

Mississippi serves the same narrowing functions as the parallel aggravating circumstance would in Georgia.

In fact, the Mississippi death penalty statute, as applied in this case, is indistinguishable from the Texas statute. In approving the Texas statute in **Jurek**, the Supreme Court recognized that, by defining capital murder narrowly, "in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed." 428 U.S. at 270, 96 S.Ct. at 2955. As this court stated in **Welcome v. Blackburn**, 793 F.2d 672, 677 (5th Cir. 1986):

> By classifying first degree murder as including certain aggravating circumstances the state has narrowed the class of those subject to the death penalty as effectively as if it allowed a broader class to be convicted but then limited those within the broader class who could be sentenced to death to only persons who crimes are accompanied by specific aggravating circumstances.

The Mississippi statute, unlike the Texas statute, provides the added protection of requiring proportionality review by the state supreme court. Compare Miss. Code Ann. §99-19-105(3)(c) (Supp. 1985) with **Pulley v. Harris**, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), See **Barclay v. Florida**, 463 U.S. 939, 103 S.Ct. 35418, 3429, 77 L.Ed.2d 1134 (1983) (plurality opinion); **Stephens**, 462 U.S. at 879-80, 103 S.Ct. at 2743. Thus, the Mississippi death penalty statute satisfies constitutional requirements despite the broad construction placed on the especially heinous aggravating circumstance by the Mississippi Supreme Court.

We do not base this decision on the harmless error doctrine of **Stephens**, 462 U.S. at 884-91, 103 S.Ct. at 2746-50. See **Barclay**, 463 U.S. at 951 n. 8, 103 S.Ct. at 3425 n. 8. Mississippi's choice to apply a broadened construction to the especially heinous aggravating circumstance is not constitutional error. If the change in construction is an error at all, it is an error of state law that is not cognizable on habeas review. **Harris**, 104 S.Ct. at 875; **Barclay**, 463 U.S. at 957-58, 103 S.Ct. at 3428-29. [Emphasis added.]

806 F.2d at 1248-49.

The Godfrey issue was raised in Johnson's petition for certiorari from the court of appeal's decision. This Court denied certiorari, and Johnson was executed on May 20, 1987. Johnson v. Thigpen, 480 U.S. 1033 (1987).

The Mississippi Supreme Court relied on the decision in Johnson v. Thigpen. In his concurring decision in Jones v. State, 517 So.2d 1295 (Miss. 1987), Justice James Robertson, who prior to the Jones decision questioned the failure to give a limiting instruction to the jury on the "especially heinous" aggravating factor in several dissenting opinions, stated:

> The **Johnson** discussion takes place in the context of a federal constitutional claim that our "especially heinous, atrocious or cruel" aggravating circumstance as applied fails to perform the narrowing function mandated by such cases as **Woodson v. North Carolina**, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) and progeny. **Johnson** finds no constitutional error because, leaving aside aggravating circumstances, our

statutory definition of capital murder narrows the class of persons eligible for the death penalty in a constitutionally adequate manner. Compare **Jurek v. Texas**, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). We have searched **Johnson** in vain for the slightest hint that the Fifth Circuit, as an external observer, considers that our "especially heinous, atrocious or cruel" aggravating circumstance -- as we have administered it for the past five years -- contributes one iota to the goal of fair and rational selection, from all capital murderers, of those whose crimes are qualitatively sufficiently reprehensible that they should be exposed to judicial consideration of the penalty of death.

517 So.2d at 1295.

Justice Robertson's "reluctant[]" concurrence in Jones clearly indicates that the State supreme court relied on the holding in Johnson v. Thigpen that the "especially heinous" aggravating factor, or for that matter any statutory aggravating factor, was not constitutionally sig-

nificant in the selection of the those who were sentenced to death.[7]

In Evans v. Thigpen, 809 F.2d at 241, the Fifth Circuit, adopting the district court's rationale regarding the "especially heinous" aggravating factor in Evans v. Thigpen, 631 F.Supp. 274 (S.D. Miss. 1986), held:

> Under current precedent of the Fifth Circuit, there is no constitutional requirement that the trial court define the terms "especially heinous, atrocious, or cruel" in its instructions to the jury. **Moore v. Maggio**, 740 F.2d 308, 321 (5th Cir. 1984). As stated in **Moore**:
>
> > The United States Supreme Court has thus far declined to require that the jury must be instructed of the narrow construction of a potentially overbroad aggravating circumstance, such as whether the crime is

---

[7] We state this with the full knowledge that this Court vacated the sentence in Jones for reconsideration partially in light of Maynard. Jones v. Mississippi, 487 U.S. 1230 (1988). However, Jones was a direct appeal case.

"especially heinous, atrocious, or cruel." Instead, the Court has looked to state appellate courts "to weed out those cases in which an overly broad construction is applied by the jury ...." See **Williams v. Maggio**, 679 F.2d 381 410 (5th Cir. 1982) (en banc) (Randall, J., dissenting) cert. denied, 463 U.S. 1214, 103 S.Ct. 3552, 77 L.Ed.2d 1399 (1983).

. . .

Moreover, the "especially heinous, atrocious or cruel" nature of the capital offense was only one of several statutory aggravating circumstances relied upon by the State and found by the jury. This contrasts sharply with the situation present in **Godfrey v. Georgia**, 446 U.S. 420 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) where the sole aggravating factor said to support the death penalty was Georgia's equivalent statutory provision, which could not be constitutionally applied to the facts present there. See **Barclay v. Florida**, 463 U.S. 939, 947 n. 5, 103 S.Ct. 3418, 3423 n. 5, 77 L.Ed.2d 1134, 1142 n. 5 (1983) (plurality opinion). In its alternative holding that the death penalty should be upheld

in this case even assuming the "heinous, atrocious, or cruel factor was not validly applied, the Mississippi Supreme Court held that the three other statutory aggravating circumstances found by the jury, i.e., murder in the course of robbery, for the purpose of avoiding arrest, and by a person under a sentence of imprisonment, were supported by "overwhelming" evidence. 422 So.2d at 743; 441 So.2d at 522. As we have noted above, there was absolutely no constitutional error with respect to any of these other aggravating factors. Under the current precedent of the Fifth Circuit, a death sentence will not be overturned on habeas review because of the constitutional infirmity or invalidity of one aggravating circumstance so long as the other statutory aggravating factors are supported by the evidence. **Watson v. Blackburn**, 756 F.2d 1055, 1057-58 (5th Cir. 1985) (describing principle as "settled law"); **Moore v. Maggio**, 740 F.2d 308, 321 (5th Cir. 1984) (rejecting argument that submission of invalid aggravating circumstance "skewed the balance" struck by jury in voting for death); **Knighton v. Maggio**, 740 F.2d 1344, 1351-52 (5th Cir. 1984); **Williams v. Maggio**, 679 F.2d 381, 388-90 (5th Cir. 1982) (en banc).[5] Compare **Collins v. Lockhart**, 754 F.2d 258, 265-68 (8th Cir. 1985). [Footnote 5 omitted.]

631 F.Supp. at 284-285.

This question was raised on certiorari to this Court, and certiorari was denied. Evans was executed on July 7, 1987.

Prior to the time the decision in Stringer v. State become final, neither the federal courts in the Fifth Circuit nor for that matter this Court ever questioned the application of the "especially heinous" factor as employed in the Mississippi scheme on the basis of Godfrey. To the contrary, the lower federal courts expressly stated that Godfrey did not have any application under the Mississippi statutory scheme for imposing the death sentence. This Court tacitly approved by the denial of certiorari on the question when raised, allowing executions to take place. To this date the precedent announced in Johnson v. Thigpen and Evans v. Thigpen has never been expressly

overruled or directly questioned by the Fifth Circuit or by this Court.

After the decision in Maynard, we find other courts of appeals differing on whether the rule announced there is new. Supporting our position that the rule in Maynard is new, we invite the Court's attention to the opinion of the Tenth Circuit in Coleman v. Saffle, 869 F.2d 1377 (10th Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 1835, 108 L.Ed.2d 964 (1990). While discussing a question of abuse of the writ, the Tenth Circuit, held:

> It cannot reasonably be disputed that our decision in Cartwright was a new and significant development in Oklahoma law. . . . Although our holding in **Cartwright** is well supported by precedent, neither this court nor the Oklahoma courts previously had given any reliable indication that the state's construction of this particular circumstance might be invalid. [Citations omitted.] [Emphasis added.]

869 F.2d at 1381.

Because no court or judge had ever questioned the validity of the construction placed on the "especially heinous" aggravating factor Coleman was allowed to escape a claim that he was abusing the writ of habeas corpus by filing a second habeas petition.

To the contrary, and showing that reasonable minds differ on the question before the Court, we look to the decision of the Eighth Circuit in Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989), cert. denied sub nom, Delo v. Newlon, ___ U.S. ___, 110 S.Ct. 3301, 111 L.Ed.2d 810 (1990). The Eight Circuit held:

> The first rule sought by Newlon and opposed by the State is that the imposition of the death penalty in this case, based on the jury's finding that the murder was "outrageously or wantonly horrible, or inhuman in that it involved depravity of mind," did not "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance'" for purposes of

> **Godfrey v. Georgia**, 446 U.S. 420, 428, 100 S.Ct. 1759, 1765, 64 L.Ed.2d 398 (1980) (plurality opinion), quoting **Gregg v. Georgia**, 428 U.S. 153, 198, 96 S.Ct. 2909, 2936, 49 L.Ed.2d 859 (1976). The rule in question is not a "new rule" under **Teague** and **Penry** because it is dictated by case law existing at the time Newlon's conviction became final.

885 F.2d at 1333.

We submit that the differences of opinions between the Fifth, Eighth and Tenth Circuits on whether Godfrey applied in Mississippi and whether Maynard was a new rule show that the outcome of this question "was susceptible to debate among reasonable minds." 108 L.Ed.2d at 356. The decisions of the Fifth Circuit on the application of Godfrey and Maynard to the Mississippi scheme of imposing the death sentence do not represent an "illogical or even a grudging application" of the rational of these cases in light of this Court's decision in Lowenfield. Butler, 108 L.Ed.2d at 357. Even though this

Court stated that Maynard was "controlled" by Godfrey, the application of Godfrey and Maynard to the Mississippi capital sentencing scheme was, as we have shown, "susceptible to debate among reasonable minds." Butler, 108 L.Ed.2d at 356. Therefore, we submit that the decision in Maynard created a new rule insofar as the application of the "especially heinous" aggravating factor in Mississippi is concerned.[8] Respondents would submit these constitute sufficient grounds to find that the rule announced in Godfrey and Maynard is a new rule as it applies to the Mississippi scheme for imposing the sentence of death.

B. Clemons.

Looking next to whether Clemons announces a new rule, we must analyze what

---

8 As can be seen from our discussion under Part B, infra, we contend that not until Clemons was Maynard directly applied to the Mississippi scheme and that it was applied incorrectly.

that decision actually does. The decision in Clemons is easily be divided into two parts.

One, the decision, for the first time, places limits on how the Mississippi Supreme Court can treat the invalidity of an aggravating circumstance that go beyond those required in Zant v. Stephens, 462 U.S. 862 (1983). Imbedded in this holding is the first application of Godfrey and Maynard to the Mississippi scheme of imposing the death sentence.[9] The import of this holding is that it constitutionalized the function of aggravating circumstances under the

---

9 Respondents realize that the Mississippi Supreme Court invited this scrutiny by addressing the decision in Maynard and its effect on tHe Mississippi scheme. The conflicting signals sent by this Court by allowing the executions of Johnson, Evans and Edwards in the face of similar questions and the vacation of the sentence in Jones certainly gave the state court cause to feel that it need to address the question of the "especially heinous" aggravating factor in light of Maynard.

Mississippi scheme for the first time in the face of the holding in Lowenfield. We submit this is the first new rule announced in Clemons, and the one that is central to the inquiry presently before the Court.

Second, the Court held that an appellate court in a weighing state could save a sentence of death by reweighing the aggravating and mitigating circumstances or by applying a harmless error analysis to the sentencing process. This also announces a new rule where the Mississippi scheme is concerned. However, this second rule is not the focus of the inquiry before the Court in this case.

The Clemons discussion begins with this revealing statement:

> We deal first with petitioner's submission that it is constitutionally impermissible for an appellate court to uphold a death sentence imposed by a jury that has relied in part on an invalid aggravating circumstance. In **Zant v. Stephens**,

462 U.S. 862, 77 L.Ed.2d 235, 103 S.Ct. 2733 (1983), we determined that a State like Georgia, where aggravating circumstances serve only to make a defendant eligible for the death penalty and not to determine the punishment, the invalidation of one aggravating circumstance does not necessarily require an appellate court to vacate a death sentence and remand to a jury. We withheld opinion, however, "concerning the possible significance of a holding that a particular aggravating circumstance is 'invalid' under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty." Id. at 890, 77 L.Ed.2d 235, 103 S.Ct. 2733. In Mississippi, unlike the Georgia scheme considered in **Zant**, the finding of aggravating factors is part of the jury's sentencing determination, and the jury is required to weigh any mitigating factors against the aggravating circumstances.2 Although, these differences complicate the questions raised , we do not believe that they dictate reversal in this case. [Footnote 2 omitted.] [Emphasis added.]

108 L.Ed.2d at 736.

This statement alone answers the question at hand. It stands to reason if the question answered in Clemons had been reserved for decision at a later date by Court in Zant. both rules announced in Clemons are new rules not dictated by prior precedent insofar as the Mississippi scheme is concerned.

The Tenth Circuit certainly believed that the question at issue in the case sub judice had never been answered. In the original opinion in Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1989) (en banc), the Tenth Circuit stated:

> We agree that "**Zant** and **Barclay** leave open the question of whether a sentencing authority that must weigh all statutory factors may consider constitutionally invalid aggravating circumstances." Special project, **Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency**, 69 Cornell L. Rev. 1129, 1181 (1984).
>
> 822 F.2d at 1482.

Clearly, the Tenth Circuit felt that the question was left open as to how a "weighing" state sentencing authority should treat invalid aggravating circumstances. The Mississippi Supreme Court had always relied on the decision in Zant as authority for upholding a sentence of death when there was the possibility of an invalid aggravating factor. The Mississippi Supreme Court had never found that the "especially heinous" aggravating factor was invalid prior to Clemons v. State, 535 So.2d 1354 (Miss.1988) and that was only in the face of Maynard. The state court had always used the authority of Zant as an alternative holding that even if the circumstance were invalid, there were other valid aggravating circumstances that would support the sentence of death. Johnson v. State, 511 So.2d 1333, 1336-1339 (Miss. 1987), rev'd on other grounds sub nom, Johnson v. Mis-

sissippi, 486 U.S. 578 (1988); Tokman v. State, 435 So.2d 664, 670 (Miss. 1983), cert. denied, 467 U.S. 1256 (1984).

After the decision in Maynard, the Fifth Circuit, without a mention of Johnson v. Thigpen, held in Edwards v. Scroggy, 849 F.2d 204 (5th Cir. 1988), cert. denied, 489 U.S. 1059, reh. denied, 490 U.S. 1032 (1989), that the invalidation of one aggravating circumstance did not require the vacation of the death penalty so long as there were other valid aggravating circumstances remaining, citing, Rault v. Butler, 826 F.2d 299 (5th Cir.), cert. denied, 483 U.S. 1042 (1997); Celestine v. Butler, 823 F.2d 74 (5th Cir. 1987) and Evans v. Thigpen, supra. See, Watson v. Blackburn, 756 F.2d 1055, 1057-58 (5th Cir. 1985); Moore v. Maggio, 740 F.2d 308, 321 (5th Cir. 1984) (rejecting argument that submission of invalid aggravating circumstance "skewed the

balance" struck by jury in voting for death); Knighton v. Maggio, 740 F.2d 1344, 1351-52 (5th Cir. 1984); Williams v. Maggio, 679 F.2d 381, 388-90 (5th Cir. 1982) (en banc). The Fifth Circuit did not rely on nor distinguish its opinion in Johnson v. Thigpen, in denying relief in Edwards. The Court chose instead to affirm under the alternative rationale of the existance of remaining valid aggravating circumstances that would support the death sentence. Discussing Maynard, the Court of Appeals distinguished it, holding:

> **Maynard v. Cartwright**, ___ U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), just decided by the Supreme Court does not undermine this conclusion. In **Maynard**, the petitioner was sentenced to death following a finding by an Oklahoma jury of two statutory aggravating circumstances: "an especially heinous, atrocious, or cruel" murder and the defendant "knowingly created a great risk of death to more than one person." The Supreme Court determined that the first aggravating circumstance was

> invalid; the second remained unchallenged. The Court, however, instead of reinstating the death penalty, approved a remand of the case to the Oklahoma Court of Criminal Appeals. But the opinion makes it clear that the Court approved this remand because Oklahoma law was unclear on whether the sentence of death should be set aside if one of the aggravating circumstances was found invalid and others remained unchallenged. Consequently, the case was remanded to the Oklahoma court to determine whether the sentence of death should be set aside if one of the aggravating circumstances was found invalid and others remained unchallenged. Consequently, the case was remanded to the Oklahoma court to determine as a matter of state law whether the sentence should be set aside. Unlike Oklahoma law, however, Mississippi law is clear that one invalid aggravating circumstance will not suffice to overturn a death penalty where other valid aggravating circumstances remain. **Edwards v. State**, 441 So.2d 84, 92 (Miss. 1983). [Emphasis added.]
>
> 849 F.2d at 211, n. 7.

Edwards raised this claim in his petition for writ of certiorari from the lower

court's decision. Certiorari was denied. Edwards was executed June 20, 1989.

Likewise, when we look to the original decision in Stringer I and the opinion in Hill v. Black, 891 F.2d 89 (5th Cir. 1989), on petition for rehearing, we find the continued assertion that Maynard error will not vacate a sentence of death because the Mississippi scheme of imposing the sentence of death allows for the affirmance of a sentence based on the remaining valid aggravating factors.

In Stringer I, the court below stated that its earlier decision in Edwards v. Scroggy had assumed for the sake of argument that the "especially heinous" argument was invalid. 862 F.2d at 1113. The Court then relied on the decision in Edwards v. Scroggy as one ground for upholding the denial of habeas relief on

this question.[10] Continuing, the court then proceeded to make an analysis under Zant holding:

> We believe that the Mississippi capital punishment scheme, as applied in this case passes constitutional muster for virtually the same reasons articulated by the Supreme Court in Zant.

862 F.2d at 1114.

As one of the foundations of this holding, the Fifth Circuit held that even

---

10 We pointed out in our response to the petition for certiorari in this case that no claim was raised at trial or on direct appeal in state court to the application of the "especially heinous" aggravating factor. On state post-conviction review the Mississippi Supreme Court held the claim to be procedurally barred for not raising the claim at trial or on direct appeal. Stringer v. State, 485 So.2d at 275. Likewise, the Federal district court held this claim to be procedurally barred from federal review. The district court alternatively held that the claim was without merit, citing Johnson v. Thigpen. Stringer v. Scroggy, 675 F.Supp. at 366. The Fifth Circuit mentioned the procedural bar and then addressed the merits of the claim. Stringer v. Jackson, 862 F.2d at 111. We continue to submit that this claim is independently procedurally barred from consideration by the Federal courts.

though Mississippi could be considered a weighing state, the distinction in the manner in which it considered aggravating and mitigating circumstances was one without a difference. The court held:

> That the jury was instructed to weigh statutory aggravating circumstances against mitigating circumstances does not alter the federal decision. We see no difference, other than one in semantics, between instructing a jury to weigh aggravating against mitigating circumstances in determining the sentence and instructing a jury to consider all aggravating and mitigating circumstances in determining the sentence and instructing a jury to consider all aggravating and mitigating circumstances in deciding on the sentence. Had the Jury been instructed as the jury was in Zant, it would have been constitutionally authorized to consider as aggravating all the facts and circumstances surrounding the crime -- for instance whether it believed the crime to be heinous, atrocious, or cruel -- and to use those considerations in arriving at a sentencing decision. That it was not so instructed, that is, that the court limited its consideration to only statutory aggravating circumstances, is a matter of state law only. Zant,

> 1103 S.Ct. at 2743 n. 17. We look to Mississippi to decide the impact of the invalid aggravating circumstance on Stringer's death sentence. Mississippi has held that the invalidation of an aggravating circumstance will not affect the death sentence so long as there is at least one valid aggravating circumstance remaining. Here, two valid aggravating circumstances remained. We overrule Stringer's argument. [Emphasis added.]

862 F.2d at 1115.

While not cited in Stringer I, this reasoning is fully supported by the earlier decision in Franklin v. Lynaugh, 487 U.S. 164 (1988). There a plurality of this Court noted:

> We also repeat our previous acknowledgment, that -- as a practical matter -- a Texas capital jury deliberating over the Special Issues is aware of the consequences of its answers, and is likely to weigh mitigating evidence as it formulates these answers in a manner similar to that employed by juries in "pure balancing" States. See **Adams v. Texas**, supra, at 46. Thus, the differences between the two systems may be even less than it

> appears at first examination. [Emphasis added.]

487 U.S. at 182 n. 12.

The language in Franklin and Stringer I also formed one of the basis for holding that Clemons was new law in the Fifth Circuit's opinion in Smith v. Black, 904 F.2d 950, 985 (1990). Thus, there was a clear indication that the difference between how a weighing state handled an invalid circumstance as opposed a state which did not required weighing was slight. These opinions ratify the Mississippi Supreme Court's reliance on the precedent found in Zant in its treatment of invalid aggravating circumstances.

The fact that other courts of appeals found that the consideration of invalid aggravating circumstances was a matter of state law supports our claim that Clemons announces a new rule. Looking to Eighth Circuit's decision in Collins v. Lockhart,

754 F.2d 258, 265-268 (8th Cir. 1985), we find it holding that if a single aggravating factor were found to be invalid the death penalty must be set aside because of the operation of state law. In reaching this decision the Eighth Circuit held that its opinion was not in conflict with the holdings of the Fifth and Eleventh Circuits because they were dealing with different state statutory schemes.

When the Tenth Circuit decided Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987), it recognized that there was a distinction in the Mississippi statute that removed it from the reach of its decision Cartwright v. Maynard. The Tenth Circuit opinion states:

> Therefore, the Oklahoma statute is unlike the statutes in those states in which aggravating circumstances are employed to narrow the class of first degree murders that are eligible for the death penalty. See **Zant**, 463 U.S. at 875, 103 S.Ct. at 2741 (Georgia); **Andrews**, 802 F.2d at 1263 (Utah); **Welcome v.**

> **Blackburn**, 793 F.2d 672, 677 (5th Cir. 1986)(Louisiana). Cf. **Johnson v. Thigpen**, 806 F.2d 1243, 1248 (5th Cir. 1986), cert. denied, ___ U.S. ___, 107 S.Ct. 1618, 94 L.Ed.2d 802 (1987) (Mississippi). [Emphasis added.]
>
> 822 F.2d at 1480.

Therefore, until the decision in Clemons the lower Federal courts clearly regarded the consideration of invalid aggravating circumstances was a matter of state law.

In the case at bar the Fifth Circuit did not make an analysis of why Clemons would not be retroactively applied to Stringer. Instead, the court cited to and relied on its detailed opinion on the question found in Smith v. Black, 904 F.2d 950 (5th Cir. 1990). There the Fifth Circuit held:

> **Clemons** rejected the contention that a Mississippi sentence partially predicated on an invalid aggravating circumstance must as a constitutional matter be vacated and remanded to a sentencing jury, but also limited for the first time Mississippi's practice of

supporting a death sentence on the basis of a remaining, valid aggravating factor. The Court found that despite recitation of the proper limiting construction of the "especially heinous" aggravating factor, examination of the facts underlying sentencing, and the suggestion that the "'punishment of death is not too great when the aggravating and mitigating circumstances are weighted against each other,'" the Mississippi Supreme Court's reference to its practice

> ... can be read as a rule authorizing or requiring affirmance of a death sentence so long as there remains at least one valid aggravating circumstance. if that is what the Mississippi Supreme Court meant, then it was not conducting appellate reweighing as we understand the concept. An automatic rule of affirmance in a weighing State would be invalid under **Lockett v. Ohio**, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and **Eddings v. Oklahoma**, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), for it would not give defendants the individualized treatment

> that would result from actual reweighing of the mix of mitigating and aggravating circumstances.

904 F.2d at 984.

Without question Clemons was the first time that this Court directly placed any limits on the manner in which the Mississippi Supreme Court was to deal with the invalidity of an aggravating factor.[11] As the Fifth Circuit, recognizing this fact, continued in Smith:

> Not until **Clemons v. Mississippi** did the United States Supreme Court specifically apply **Godfrey** and **Maynard** to the Mississippi aggravating circumstance, and before that application it could at least be said the constitutional practice of Mississippi's redemptive

---

11 In Johnson v. Mississippi, 486 U.S. 578 (1988), two members of this Court in a concurring opinion stated that on remand that the state court must decide whether or not to remand for resentencing before a jury or decide for itself "the appropriate sentence without reference to the inadmissible evidence, thus undertaking to reweigh the two untainted aggravating circumstances against the mitigating circumstances." 486 U.S. at 591.

status was ambiguous making reasonable for **Teague** purposes the rule preceding **Clemons**. See **Butler**, ___ U.S. ___, 110 S.Ct. at 1217, **Saffle**, ___ U.S. ___, 110 S.Ct. 1260-61. In **Evans v. Thigpen**, 809 F.2d 239, 241 (5th Cir.)(dicta), cert. denied, 483 U.S. 1033, 107 S.Ct. 3278, 97 L.Ed.2d 782 (1987), **Edwards v. Scroggy**, 849 f.2d 204, 211 n. 7 (5th Cir. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 1328, 103 L.Ed.2d 587 (1989), and most recently in **Stringer v. Jackson**, 862 F.2d 1108, 1113-15 (5th Cir. 1988), which the Supreme Court has vacated and remanded for consideration in light of **Clemons v. Mississippi**, see ___ U.S. ___, 110 S.Ct. 1800, 108 L.Ed.2d 931 (1990), various panels of this court have sustained death sentences premised in part on an invalid aggravating circumstance by recognizing the Mississippi practice of sustaining verdicts when supported by at least one valid aggravating circumstance. Under the practice, perhaps first represented in **Evans v. State**, 422 So.2d 737, 743 (Miss. 1982), cert. denied, 461 U.S. 939, 103 S.Ct. 2111, 77 L.Ed.2d 314 (1983), the Mississippi Supreme Court typically would recognize the problematic constitutionality of the "especially heinous, atrocious, or cruel" aggravating circumstance, possibly review the sentence for proportionality and under the **Coleman** limiting

construction of the circumstance and uphold the sentence if in any event the jury had found at least one other valid aggravating circumstance. [Citations omitted.]

This practice relied in part on decisions of the Supreme Court subsequent to **Lockett** and **Eddings** (and subsequent by a matter of months to the point at which Smiths conviction became final) that might have appeared to confirm the constitutionality of the Mississippi practice. **Zant v. Stephens**, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), upheld a death sentence administered under the Georgia sentencing scheme when one of three aggravating circumstances found by the jury was subsequently held invalid by the Georgia Supreme Court while the other two aggravating circumstances were specifically upheld. Although the opinion recognized the potential differences attending a "weighing" state, id. at 873 n. 12, 890-91, 103 S.Ct. at 2741 n.12, 2750, the chief import of the decision was often viewed as confirming the constitutional latitude afforded the common state practice of redeeming death sentences when more than one aggravating circumstance was present, and **Zant** was relied upon by this court and the Mississippi Supreme Court in warranting the Mississippi

practice. [Citations omitted.] [Emphasis added.]

904 F.2d at 984-985.

As we pointed out in the section dealing with Godfrey/Maynard retroactivity, Clemons represents the first application of the Godfrey/Maynard rule to the consideration of the "especially heinous" aggravating circumstance in the Mississippi scheme. The holding that this circumstance was unconstitutionally vague without a limiting definition was contrary to all prior rulings of this Court and the lower federal courts. See, Part A, supra.

After pointing out the practice of considering invalid aggravating circumstances as perceived by the Fifth Circuit in prior precedent, Judge King continued her analysis by stating that while Barclay v. Florida, 463 U.S. 939 (1983), and Maynard, may have "suggested reservations regarding certain circumstances in 'weighing' states," these "reserva-

tions distinguishing schemes like that administered Mississippi" could not be said to be "legal determinations that control the outcome of [Stringer's] case" and were certainly not the "law applicable at the time his conviction became final." 904 F.2d at 985.

Concluding, Smith holds:

> [T]he **Teague** doctrine in part tolerates the diversity of state schemes by accepting the fact that various jurisdictions will not always correctly anticipate the ultimate constitutional significance of every detail. Instead, "reasonable, good-faith interpretations of existing precedents" are sufficient to prevent the application of new law. **Butler**, 110 S.Ct. at 1217; see also **Sawyer v. Smith**, ___ U.S. ___, 110 S.Ct. at 2828-29 (incorrect characterizations by Mississippi Supreme Court further indicates extent to which subsequent constitutional ruling was not dictated). We hold consequently, that the application of Clemons to Smith would involve the application of a "new rule" on collateral review a practice normally barred by **Teague**.

904 F.2d at 986.

In case after case the practice of the Mississippi Supreme Court in dealing with the "especially heinous" aggravating circumstance and the treatment of invalid circumstances was allowed to stand. Not until Clemons did this Court place any limits on the manner in which the Mississippi court was to consider invalid circumstances or constitutionalize the function of aggravating circumstances in Mississippi. All prior decisions indicated that the treatment was correct or that it was totally a state law matter. Thus, the limitation placed on the consideration of aggravating circumstances that were found to be invalid by the Mississippi Supreme Court created a new rule within the meaning of Teague.

The question then arises, what about the citation of Clemons in Parker v. Dugger, 498 U.S. ___, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991)? Without question

Parker was a case pending federal collateral review when Clemons, a direct appeal case, was decided.[12] Normally, there is no application of new rules to cases pending of collateral review. Teague. We submit that the application of that part of Clemons that allowed for appellate reweighing in the Florida scheme was not the application of a new rule as it applies to that scheme.[13]

---

12 We note that this Court's decision in Collins v. Youngblood, ___ U.S. ___, 110 S.Ct. 2715 (1990) makes clear that a court need not raise the Teague bar on its own motion, although it may do so. The non-retroactivity of Clemons was not urged by Florida in Parker and this Court did not address the issue of retroactivity in its opinion. Since the resolution of the retroactivity question is at best ambiguous, we submit that Parker does not represent a case that would have an effect on the decision of the Fifth Circuit holding that Clemons will not to be retroactively applied to cases pending on federal post-conviction review.

13 We submit the decision in Wainwright v. Goode, 464 U.S. 78 (1983), foretold that part of Clemons that allows appellate reweighing of aggravating and

As previously stated, Clemons is a two part decision. The part not in question here, but relied on by this Court in Parker, required appellate reweighing or harmless error analysis to save a death sentence in a weighing state. Whether this part of Clemons constitutes a new rule as to the Florida scheme is not the

---

mitigating circumstances as far as the Florida scheme is concerned. In Goode, the Florida Supreme Court, according to this Court, stated:

> "[C]omparing the aggravating circumstances and mitigating circumstances with those in other capital cases and weighing the evidence in the case subjudice, or judgment is that death is the proper sentence." **Goode v. State**, 365 So.2d, at 384-385. [Emphasis added.]

468 U.S. at 86.

This Court then characterized this action as a reweighing of aggravating and mitigating circumstances. Florida made no mention whether it was reweighing the aggravating and mitigating circumstances in that case, only that it was comparing them with those found in other cases. This Court found that a reweighing had been done, but did not require such.

question that this Court is presented with in the case at bar. The question to be decided here is whether this Court's holding that Mississippi could no longer rely on Zant when affirming a death sentence based in part on an invalid aggravating circumstance is a new rule. This part of Clemons was not cited to or relied upon in Parker.[14]

Mississippi was told in Clemons, for the first time, that it must do a reweighing or make a harmless error analysis before it could affirm a sentence of death based on a invalid aggravating factor even though prior precedent had led it to believe that their aggravating factors played no part in the constitutionally

---

[14] The remaining citations to Clemons in Parker are to consideratins of individualized sentencing determinations. This is certainly not a novel consideration raised or established as a rule in Clemons. Parker concerns what mitigating evidence must be considered by a sentencing authority, Clemons concers how this is to be done.

required narrowing process. Thus, this Court's citation of Clemons and the second part of that decision in Parker does not force retroactive application of a new and different rule to Stringer.[15]

In the years prior to Clemons the Mississippi Supreme Court had relied on a "reasonable good-faith interpretation of [the] existing precedents" in Zant, Johnson v. Thigpen, Evans v. Thigpen, and Edwards v. Scroggy to affirm death sentences when one of the aggravating circumstances appeared to be invalid. This Court's decision holding Zant could no longer be relied on by a weighing state and by constitutionalizing the function of Mississippi's aggravating circumstances,

---

15 Contrary to petitioner's assertion, Stringer is not similarly situated as Parker. The distinction in the two cases is dramatically revealed by the difference in the two capital punishment schemes as is shown in our discussion outlining the operation of the Mississippi capital punishment scheme.

contrary to the clear teaching of Lownefield, created a new rule by limiting the Mississippi Supreme Court's discretion in upholding death sentences for the first time.

C. Exceptions to Teague.

The next step of the inquiry is to determine whether or not the new rule announced in Clemons falls within one of the two exceptions to the non-retroactivity rule of Teague. The first exception as announced in Teague was that the new rule will be retroactively applied "if it places 'certain kinds of primary private individual conduct beyond the power of the criminal law-making authority to proscribe.'" 489 U.S. at 311. This was later expanded in Penry v. Lynaugh, 492 U.S. 302 (1989), to cover the sentence phase of death penalty cases by holding that a new rule would be retroactively applied if it prohibited "a certain category of punish-

ment for a class of defendants because of their status or offense." 109 S.Ct. at 2953. Clearly, the rules announced in Maynard and Clemons do not "decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons." Thus neither rule falls within the first exception and neither applies to Stringer's case. Saffle, 110 S.Ct. at 1263.

The second exception was well stated by the court of appeals in Smith v. Black and we would quote from that decision to set it out. Judge King stated:

> The second exception is for those rare "watershed rules of criminal procedure" which implicate the fundamental fairness and accuracy of the criminal proceeding. See **Saffle**, ___ U.S. at ___, 110 S.C.t at 1263; **Butler**, 110 S.Ct. at 1218. As the en banc court noted in **Sawyer v. Butler**, 881 F.2d 1273, 1294 (5th Cir.1989) (en banc), aff'd sub nom. **Sawyer v. Smith**, ___ U.S. ___, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990), this exception is tailored to those rules designed

> to redress constitutional violations which "so distort the judicial process as to leave one with the impression that there has been no judicial determination at all, or else skew the actual evidence crucial to the trier of fact's disposition of the case," and does not include procedurally flawed contemplation or review of relevant evidence. As the Supreme Court recently observed in **Sawyer v. Smith**, "[a]ll of our Eight Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense," but **Teague's** second exception is limited to "watershed" rules affecting "bedrock procedural elements." ___ U.S. ___, 110 S.Ct. at 2831. The rule on which Smith would rely is not of such exalted stature.
>
> 904 F.2d at 986-987.

The new rule created in Maynard and the one created in Clemons, under consideration here, are not "watershed" or "bedrock" rules of criminal procedure. Maynard and Clemons clearly represent decisions relating to "procedurally flawed contemplation or review of relevant evidence." Smith v. Black, 904 F.2d at 986. For

this reason we would submit that Stringer's case does not fall under the second exception announced in Teague.

CONCLUSION

For tne above and foregoing reasons the decision of the United States Court of Appeals for the Fifth Circuit affirming the denial of habeas corpus relief as to petitioner's sentence of death in this case should be affirmed.

Respectfully submitted,
MIKE MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
(Counsel of Record)

CHARLENE R. PIERCE
SPECIAL ASSISTANT
ATTORNEY GENERAL

ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39206
Telephone: (601) 359-3680

October 17, 1991

CERTIFICATE OF SERVICE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, three (3) true and correct copies of the foregoing Brief for Respondents to the following:

Kenneth J. Rose, Esquire
923 Carolina Avenue
Durham, North Carolina 27705

James W. Craig, Esquire
123 E. Griffith Street
Jackson, Mississippi 39201

Louis D. Bilionis, Esquire
School of Law
University of North Carolina
Chapel Hill, N. C. 27599-3380

This the 17th day of October, 1991.

Marvin L. White, Jr.
MARVIN L. WHITE, JR.